Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, a Florida municipal corporation, and THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the court of appeals decision conflict with the holding in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979), and the teaching of this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), that an employer can be relieved of its obligation to reasonably accommodate an employee's religious practices only if the available accommodations involve more than *de minimis* tangible costs, such as payment of premium wages or a demonstrable loss of efficiency?

2. Does the court of appeals decision reflect a serious trend by lower courts to erroneously lower the "undue hardship" standard to Title VII's religious accommodation requirement so employers need do nothing when asked for such an accommodation, a trend only this Court can reverse?

3. Does the court of appeals decision commit manifest error in creating, by judicial fiat, an exemption from the religious accommodation requirement of Title VII for municipal law enforcement agencies?

PARTIES TO THE PROCEEDINGS

Petitioner: Aston A. Beadle

Respondents: City of Tampa, Florida, a municipal corporation, and The City of Tampa, Florida, Police Department.

There are no parent companies or subsidiaries. Petitioner makes this declaration pursuant to Supreme Court Rule 29.

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Miscellaneous:

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CITY OF TAMPA, FLORIDA, a Florida municipal corporation, and THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Aston A. Beadle petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit. The opinion and judgment of the court of appeals was entered on January 18, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh

Circuit is reported at 42 F.3d (11th Cir. 1995), and appears in the Appendix at 1a-10a, *infra*.

The memorandum opinion of the United States District Court for the Middle District of Florida, Tampa Division, entered on October 1, 1994, is unreported and in the Appendix at 11a-28a, *infra*.

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*) and 28 U.S.C. § 1331 (general federal question jurisdiction), petitioner brought this suit in the United States District Court for the Middle District of Florida, Tampa Division. On October 4, 1993, the district court entered judgment on the merits in favor of the defendants. (*See* App. at 29a, *infra.*)

On January 18, 1995, in response to petitioner's appeal, the Eleventh Circuit entered a judgment and order affirming the district court's judgment. (*See* App. at 1a-10a, *infra.)*

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or

practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

A. Relevant Facts

1. Background

Aston Beadle is a member of the Seventh-day Adventist Church. A tenet of that faith forbids secular labor during its Sabbath (from sundown Friday to sundown Saturday). Adventists refrain from routine work during the Sabbath, although they may engage in emergency or humanitarian work (App. at 2a).

Born and raised in Jamaica, Beadle worked as a policeman in that country for two years before coming to the United States. Choosing law enforcement as his life's work, Beadle served a brief time with the Hillsborough (Florida) County Sheriff's Office but because he could not work on his Sabbath lost his job (App. at 12a).[1] Beadle then sought other law enforcement positions.

2. The Department's Refusal to Accommodate

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[1]Beadle's action against the Hillsborough County Sheriff's office was tried by the same Magistrate Judge, Charles R. Wilson, as heard this case. There the magistrate judge held for the Sheriff's office, using the same analysis as employed here and concluding the neutral rotating shift system utilized by the Sheriff's Department constituted a reasonable accommodation. A Petition for Writ of Certiorari in that case was docketed in this Court on March 31, 1995, as *Aston A. Beadle v. Hillsborough County Sheriff's Dep't, et al.*, No. 94-1610. Because both the *Hillsborough County Sheriff's Department* case and this case employed similar analyses, the cases should be consolidated for oral argument.

On January 26, 1987, Beadle successfully completed the Tampa police officer's civil service examination. In an interview, he informed the Department he was a Seventh-day Adventist and could not work on his Sabbath. The Department informed Beadle it was "not required to make any special allowance for him." (App. at 2a; PX 9 at 1). Captain Walker of the Department's Personnel Bureau, on April 28, told Beadle that he would not be accommodated and would not be hired unless willing to work at the time and day scheduled (PX 11 at 1; Walker Dep. R2-64-41:3-14). As a result of Beadle's Sabbath accommodation request, Walker recommended he not be hired (App. at 13a).

Consequently, the Police Chief asked the City Attorney for a legal opinion on the Department's obligation to accommodation Beadle (Walker Dep. R2-64-24:23-27:11). On January 4, 1988, the opinion concluded the Department was not required to provide an accommodation for Beadle's religious beliefs (App. at 13a).

On February 4 during his final interview, the Department told Beadle he would not be recommended for hire because he refused to work during his Sabbath (R4-47:4-49:1; 95:7-96:5). Nevertheless, early the following week, the Department asked Beadle if he was still interested in attending the police academy. Beadle indicated he was and received instructions to report for employment preliminaries (R4-50:21-52:4).

Beadle reported for orientation on February 19, 1988. In June he successfully completed the course of study at the Tampa Police Academy. Although the Department was aware of Beadle's religious accommodation needs, it nonetheless "randomly assigned" him to Sergeant Cook's training squad, a position which had Tuesdays, Wednesdays, and Thursdays off. Sergeant Dawson's training squad, to which Beadle could

have been assigned, had Thursdays, Fridays, and Saturdays off (Cook Dep. R2-66-118:7-19; R4-199:12-25). Because of the assignment to Cook's training squad, Beadle was scheduled to work on his Sabbath (App. at 14a).

During his first week of field training, Beadle requested Saturday off and was permitted to be absent without pay. But the Police Chief informed Beadle further requests would not be granted (R2-60:7-13; 214:1-12; App. at 15a).

The following week the Department denied Beadle's request for Saturday off. He then requested a transfer to another squad, but the Department denied this request, explaining if Beadle's request for a specific day off was granted, the Department would have to grant other similar requests (App. at 15a).

At a meeting on January 21 or 22, the Police Chief demanded Beadle "work [his] shift." Under protest, Beadle resigned (App. at 15a).

3. Feasible No-Cost Means of Accommodation

Recruits in field training worked four 10-hour days, followed by three consecutive days off. The shift rotated forward one day each week every 56 days (App. at 3a). All concede if Beadle had been assigned to Sergeant Dawson's squad, initially he would have had Saturdays off. Recruits usually spent the first six weeks and the last two weeks with one field training officer while rotating to one or more other field training supervisors with different schedules for the interim 8-week period. Consequently, had Beadle rotated with the other members of his squad without an accommodation, he eventually would have been assigned to work some Saturdays (App. at 15a, 26a).

Sergeant Cook indicated trainees were assigned to a regular squad rather than being placed in a training squad. Under this arrangement, two field training officers were assigned per squad throughout the district. This program was no different from what would have occurred had Beadle been assigned to Sergeant Dawson's squad for two 56-day cycles, alternating between two training officers (Cook Dep. R2-66-43:13-44:10; 125:18-126:17). The Department unfortunately refused this scheduling device to accommodate Beadle.

According to Sergeant Cook, such a training program was not detrimental to the recruit or to the Department (Cook Dep. R2-66-127:15-128:16). Although the training would have been essentially the same, it was not used to accommodate Beadle because it "was not the policy at the time." (Cook Dep. R2-66-129:12-20). Colonel Fox conceded Beadle could have been accommodated throughout his training by being assigned to Sergeant Dawson's squad but explained: "That's just the way we did business." (R4-200:2-201:4).

The trial court found "a possible permanent accommodation [after completion of field training] would have been to permit Beadle to work at what was known as the 'downtown squad.'" (App. at 18a-27a). The court also noted another possible permanent accommodation would have been an assignment as a background investigator. Both were traditionally Monday through Friday positions (App. at 18a).

B. The EEOC Determination

On March 30, 1990, the Equal Employment Opportunity Commission (App. at 31a) determined the Department's treatment of Beadle violated Title VII of the Civil Rights Act of 1964 (*id.*):

> The evidence substantiates that because of the alleged discriminatory treatment, Charging Party's working conditions became sufficiently intolerable that a reasonable person in Charging Party's position would have resigned.

(*Id.*).

C. The Trial Court's Decision

The trial court found Beadle established a prima facie case of religious discrimination under Title VII (App. at 23a). As to Beadle's 16-week field training program, the court said:

1. "Beadle was not assigned to the training squad that had the weekend days off, even though it was known that he was a Seventh-day Adventist who did not wish to work on Saturdays." (App. at 14a);

2. "Had Beadle been assigned to Sergeant Dawson's squad instead of Sergeant Cook's, he would have his days off on Thursday, Friday, and Saturday during the first 56-day cycle." (App. at 15a);

3. "[N]o reason was given [by the Department] for Beadle's assignment to Sergeant Cook's rather than Sergeant Dawson's squad other than it was a random assignment and no accommodation would be made for Beadle." (App. at 15a);

4. "[O]ther than granting him his first Saturday off of his training period, the City made absolutely no accommodations whatsoever to Beadle's religious needs other than the benefits of its neutral rotating shift system." (App. at 26a); and

5. The Police Department refused to accommodate Beadle

because if Beadle's "request for a specific day off was granted, the Department would then have to concern itself with accommodating similar requests made by others." (App. at 15a).

The court did not disagree that after his 16-week field training Beadle could have been permanently accommodated since "other positions were available in the City of Tampa Police Department, such as what is known as the 'downtown squad', assignment . . . which would accommodate his religious beliefs." (App. at 27a).

Like its decision in *Beadle v. Hillsborough County Sheriff's Dep't*, the court found "the city met its obligation under Title VII when it offered the neutral shift rotating system as a reasonable accommodation to Beadle." (App. at 28a).

The trial court interpreted *Hardison* "to provide that Title VII does not require a law enforcement agency of the nature of the City of Tampa Police Department to grant its law enforcement officer a permanent weekly religious accommodation to the exclusion of his or her fellow officers." (App. at 27a). It reached this decision despite specifically finding it was "unable to conclude that the accommodation of a transfer of Beadle to another training shift would have deprived another police trainee of the benefits of the neutral scheduling system." (App. at 27a). The court explained:

> [T]he Court concludes that requiring the Department to grant shift exceptions to Beadle would be to incur a greater than **de minimis** cost because of the public health, safety and welfare considerations associated with police work.

(App. at 27a).

D. The Court of Appeals Decision

The Eleventh Circuit noted that "[r]elying on *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589 (11th Cir. 1994), the city and Department argue that a neutral rotating shift system is necessarily a reasonable accommodation." (App. at 8a). The court distinguished this case from *Hillsborough* where voluntary swaps were permitted. But the Tampa Police Department made no such allowance (App. at 8a).

The court of appeals observed: "Aside from granting Beadle his first Saturday off from work, the magistrate found that the Department did nothing to accommodate Beadle other than the neutral rotating shift system." (App. at 8a). But the court promptly discarded the trial court's "reasonable accommodation" conclusion while affirming its "undue hardship" conclusion (App. at 8a):

> We conclude that the magistrate court did not err when it found that requiring the Department to grant shift exceptions would result in a greater than *de minimis* cost and that the City had met its obligation under Title VII.

(App. at 10a). The Eleventh Circuit acknowledged that 42 U.S.C. § 2000e(j) provides "[t]he employer violates [Title VII] unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.'" (App. at 6a-7a) (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986)).

Two related points flow from the Eleventh Circuit's conclusion. First, it mistakenly expands the *Hardison* "*de*

minimis" costs standard to include "not only monetary concerns, but also the employer's burden in conducting its business." (App. at 7a). Second, it further expands "*de minimis*" to include "health, safety, and welfare of its citizenry" (App. at 9a) despite a record silent concerning such facts; and a *Hardison* decision which focused on tangible costs to the employer.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Eleventh Circuit's decision lowers the standard an employer must meet in satisfying its accommodation duty. In so doing, the court ignores congressional language and intent. The decision also misinterprets this Court's holding in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); and directly conflicts with the Eighth Circuit Court of Appeals' decision in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979). The Eleventh Circuit's decision (and its earlier decision in *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589 (11th Cir. 1994), employing nearly identical reasoning) negates Title VII's religious accommodation requirement. The court shrinks the meaning of "undue hardship" to "more than *de minimis* burden" and then makes a per se finding, without reference to the language of Title VII, that law enforcement agencies cannot accommodate without exceeding such a minimal burden.

The Eleventh Circuit decisions reflect a serious and growing trend by lower courts to expand the "undue hardship" exception to Title VII's religious accommodation requirement in such a manner that employers, as here, need do nothing when confronted by an employee's request for an accommodation. These decisions also illustrate how

governmental agencies, relying on counsel's interpretation of the case law, can ignore their accommodation requirements. A grave risk exists that the Eleventh Circuit's twin opinions will be interpreted by other courts and employers to say law enforcement agencies and others are exempt from Title VII's religious accommodation requirements.

Moreover, this Petition asks whether *Hardison*'s *de minimis* cost holding should be clarified due to its misapplication by lower courts and in light of evolving Establishment Clause jurisprudence. For example, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985), suggests the Establishment Clause permits a workplace accommodation unless it "would cause the employer *substantial* economic burdens or when the employer's compliance would require the imposition of *significant* burdens on other employees required to work in place of the Sabbath observers." (Emphasis supplied).

I. THE COURT OF APPEALS ERRONEOUSLY LOWERED THE STATUTORY "UNDUE HARDSHIP" STANDARD APPLIED IN TITLE VII RELIGIOUS ACCOMMODATION CASES.

The decision below replaces Congress' "reasonable accommodation without undue hardship" standard with a judicially fashioned "more than *de minimis* burden" standard, thus gutting the religious accommodation requirement of Title VII. This act of judicial activism is antithetical to Congress' intent and directly opposes EEOC's interpretation of the statute.

In 1972 Congress, without opposition, amended Title VII of the Civil Rights Act of 1964 providing in section 701(j) (42 U.S.C. § 2000e(j)):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice *without undue hardship on the conduct of the employer's business*. [Emphasis supplied.]

Referring to the above statutory provision, this Court in *Hardison*, 432 U.S. at 74, stated "[t]he intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."

In determining whether accommodation suggested by the court of appeals would result in undue hardship, this Court rejected an arrangement permitting Hardison to work a four day workweek to avoid working on his Sabbath. The court of appeals "[r]ecognizing that this might have left TWA shorthanded on the one shift each week that Hardison did not work . . . concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments." 432 U.S. at 84. As an alternative, "the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages." *Id.* But this Court found that "[b]oth of these alternatives would involve *costs* to TWA, either in the form of lost efficiency in other jobs or higher wages." *Id.* (emphasis supplied).

This Court concluded "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* In reaching this conclusion, this Court

explained:

> Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

Id. at 84-85.

The Eleventh Circuit's holding which equates "undue hardship" with only a theoretical and speculative more than *de minimis* burden is like being in an "Alice-in-Wonderland world where words have no meaning." *Cummins v. Parker Seal Co.*, 516 F.2d 544, 550 (6th Cir. 1975) (quoting *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring)). In concluding "the phrase '*de minimis* cost' entails not only monetary concerns, but also the employer's burden in conducting its business (App. at 7a), the Eleventh Circuit clashes directly with the Eighth Circuit in *Brown v. General Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979). It also conflicts with the Third, Sixth, and Seventh Circuits' undue hardship analyses in *Protos v. Volkswagen of America,*

Inc., 797 F.2d 129, 133 (3d Cir. 1986); *McDaniel v. Essex International*, 696 F.2d 34, 37, 38 (6th Cir. 1982);[2] and *Redmond v. GAF Corp.*, 574 F.2d 897, 903-04 (7th Cir. 1978), that limit "more than *de minimis* cost" findings to tangible direct and indirect financial costs. Ironically, the Eleventh Circuit's decision backs away from its earlier decision in *Wisner v. Truck Central*, 784 F.2d 1571, 1573 (11th Cir. 1986), which concluded that *Hardison* "held that to require the employer to bear costs (in a financial sense) that were more than *de minimis* was undue hardship."[3]

This case is the most disturbing example of how the reasonably high "undue hardship" standard has been emasculated. But it is only the culmination of a trend toward replacing the statutory standard with a much lower "more than *de minimis* burden" standard through judicial erosion. This has been accomplished by courts equating the phrase "more than *de minimis* burden" with the term "undue hardship." This progressive movement may be traced from such decisions as *Howard v. Haverty Furniture Co.*, 615 F.2d 203, 206 (5th Cir. 1980); *Bhata v. Chevron U.S.A., Inc.*, 734 F.2d 1382,

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[2]In *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th cir. 1987) (quoting *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975), the court rejected the Eleventh Circuit's finding that the employer sustains its burden of proof "merely by showing that an accommodation would be . . . disruptive of the operating routine."

[3]The Eleventh Circuit again referred to economic costs in *Lake v. B.F. Goodrich Co.*, 837 F.2d 449, 452 (11th Cir. 1988), when it spoke of *Hardison* as "disapproving of requiring an employer to finance additional days off for employees with certain religious beliefs," citing *Wisner*, 784 F.2d at 1574.

1384 (1984); *Benefield v. Food Giant, Inc.*, 630 F. Supp. 78, 79 (M.D. Ga. 1985), *aff'd*, 792 F.2d 1125 (11th Cir. 1986); *Moore v. A.E. Staley Mfg. Co.*, 727 F. Supp. 1156, 1162 (N.D. Ill. 1989); *Ackerman v. National R.R. Passenger Corp. AMTRAK*, 772 F. Supp. 579, 582 (S.D. Fla. 1990); *Ryan v. United States Dep't of Justice*, 950 F.2d 458, 461, 462 (7th Cir. 1991); through *Blair v. Graham Correctional Center*, 782 F. Supp. 411, 414, 415 (C.D. Ill. 1992), *aff'd*, 4 F.3d 965 (7th Cir. 1993).

The *Hardison* Court announced that Title VII's religious accommodation provision does not impose a duty on employers to incur more than *de minimis* cost "either in the form of lost efficiency in other jobs or higher wages." 432 U.S. at 84. This is because "[t]o require . . . [an employer] to bear more than a *de minimis* cost in order to give . . . [an employee] Saturdays off is an undue hardship." *Id.* Unlike the Eleventh Circuit, this Court did not say a more than *de minimis* burden on an employer's business or a more than *de minimis* impact on a coworker constitutes an undue hardship.

The Eleventh Circuit's decision is also contrary to the EEOC's understanding of the statute. In interpreting the "undue hardship" component of section 701(j) in the context of this Court's holding in *Hardison*, the EEOC stated:

> In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that cost similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought

> are costs which an employer can be required to bear as a means of providing a reasonable accommodation.

29 C.F.R. § 1605.2(e)(1) (App. at 38a).

As indicated, the Eleventh Circuit's decision conflicts and clashes with several other federal courts. In *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979), the employer argued against an accommodation where the employee would leave work every Friday at sunset and General Motors would use its existing substitute pool which it normally employed to replace regular employees' unscheduled absences. *Id.* at 959. The district court found there were sufficient numbers of qualified workers available without additional cost in wages or overtime. *Id.* Although General Motors argued that accommodating Brown would "theoretically" require General Motors to hire an additional full-time employee by citing evidence of previously increased absenteeism on Fridays, the court held that such "'theoretical' future effects cannot outweigh the undisputed fact that *no monetary costs and de minimus efficiency problems were actually incurred* during the three month period in which Brown was accommodated." *Id.* at 960 (emphasis supplied).[4]

In *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 135 (3d Cir. 1986), the Third Circuit stated: "[u]nlike the accommodation proposed in *Hardison*, the employer here was

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[4]The *Brown* analysis has subsequently been relied upon in other cases. *See Murphy v. Edge Memorial Hosp.*, 550 F. Supp. 1185, 1192 (M.D. Ala. 1982); *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 259 n.3 (N.D. Ill. 1983); and *Cook v. Chrysler Corp.*, 981 F.2d 336 (8th Cir. 1992).

not obliged to pay higher wages in order to fill Protos's vacancy. The district court articulated the correct legal standard, as set forth in *Hardison*." The court also stated:

> The principal issue before the district court was the degree of hardship that accommodating Protos's request for Saturdays off would have imposed on Volkswagen. Finding that "defendant suffered no economic loss" because of Protos's absence, and that the "efficiency, production, quality and morale" of her segment of the Trim Department and the entire assembly line remained intact without her, the district court ruled that Volkswagen could have accommodated her "without undue hardship and at no cost."

Id. at 132.

In *Redmond v. GAF Corp.*, 574 F.2d 897, 903-04 (7th Cir. 1978), the court concluded that an employer's discharge of a religious observer constituted religious discrimination. In reaching this conclusion, the court found that an accommodation would not have resulted in regular overtime and there was no proof of lost efficiency through the use of a replacement.

The court in *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982), rejected an undue hardship claim. It observed in accommodating McDaniel's religious beliefs proscribing payment of union dues, a charity substitute accommodation would not require the "expenditures for overtime or additional wages."

The judicial perception that the "undue hardship" exception should be diluted no doubt results from *Hardison*'s "*de*

minimis" cost language which arose from an unarticulated attempt to save Title VII's religious accommodation provision from the perils of the Establishment Clause.[5] But, to the extent an accommodation does not require expending extra money or does not result in substantial imposition on coworkers, no Establishment Clause problem exists. Two post-*Hardison* decisions illustrate this point well.

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985), this Court struck down, as violative of the Establishment Clause, Connecticut's absolute and unqualified statutory exemption for Sabbath observance. This Court noted

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[5]Several courts have concluded that this Court's "more than *de minimis* cost" standard resulted from Establishment Clause concerns rather than from a dictionary understanding of the term "undue hardship" or the product of divining the legislative intent behind section 701(j) of Title VII. In *Gibson v. Missouri Pac. R.R.*, 620 F. Supp. 85, 88-89 (E.D. Ark. 1985), the court observed:

> A private employer is not required under 42 U.S.C. § 2000e *et seq.* to rearrange schedules to accommodate an employee's religious observance of Sabbath in violation of seniority and overtime provisions of a collective bargaining agreement or incur greater than *de minimis* cost, as either would constitute "undue hardship." To require employers to do so would therefore violate the establishment clause under the First Amendment of the United States Constitution.

See also Meadows v. Golden Grain Macaroni Co., 45 Fair Empl. Prac. Cas. (BNA) 235, 241 (N.D. Ill. 1987).

"there is no exception when honoring the dictates of Sabbath observers would *cause the employer substantial economic burdens* or when the employer's compliance would require *the imposition of significant burdens on other employees* required to work in the place of the Sabbath observers." (Emphasis supplied).

Observing that not all benefits conferred exclusively "upon individuals on account of their religious beliefs are forbidden by the Establishment Clause," this Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989), declared accommodation provided by legislative act that "did not, or would not, impose *substantial burdens* on nonbeneficiaries while allowing others to act according to their religious beliefs . . ." was acceptable under the Establishment Clause. This is precisely what section 701(j) of Title VII demands. Although Title VII "rides a fine line between the desire to eradicate religious discrimination, and the Establishment Clause's preclusion against the favoring of religious beliefs over other nonreligious beliefs, [i]t succeeds insofar as it does not result in undue hardship to the employer. . . ." *Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 265 (9th Cir. 1988).

Professor Michael McConnell addressed the constitutional dimension of accommodation in the workplace in *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 704 n.76 (March, 1992). He observed, "as an interpretation of the [Title VII] statute, . . . the decision [in *Hardison*] is almost certainly wrong." According to Professor McConnell, although this "Court did not explicitly refer to the Establishment Clause as a basis for its interpretation," *id.*, its holding was "probably out of concern that a more burdensome accommodation requirement would violate the Establishment Clause." *Id.* at 704.

The records and briefs before the Court in *Hardison* suggest, at is core, it was an Establishment Clause case. (*See* Brief of Appellant at 21-46 and Brief of Respondent at 23-29.) Nine amici curiae briefs addressed the Establishment Clause question, and the Court itself referenced the issue, 432 U.S. at 69-70 and n.4.

It is one thing for the Court to hold, as it did in *Hardison*, that an employer incurs an undue hardship if it must bear more than a *de minimis* cost in terms of lost efficiency or the payment of premium wages. But it is quite another if the Court meant, as the courts below seem to contend, that an employer has no further accommodation duty if alternative means of accommodation result in a mere *de minimis* burden on the employer's business.

Professor McConnell explained the *de minimis* cost standard:

> This cannot be the constitutional test; most accommodations that have been recognized as legitimate impose more than a de minimis burden on others. Moreover, when legislatures adjust the benefits and burdens of economic life among the citizens, they regularly impose more than a de minimis burden for the purpose of protecting important interests of the beneficiary class.

McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. at 704.

By lowering the "undue hardship" standard to simply "more than *de minimis* burden," the Court negates the duty to accommodate. The Ninth Circuit illustrates this reality by asserting: "A standard less difficult to satisfy than the 'de

minimus' standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine." *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

Justice Scalia noted in *Edwards v. Aguillard,* 482 U.S. 578, 618 (1987), that while the Court has "warned that at some point, accommodation may devolve into 'an unlawful fostering of religion' [citation omitted] . . . [the Court has] not suggested precisely (or even roughly) where that point might be." Guidance from this Court is now needed if the Establishment Clause did in fact give birth to the mangled interpretation of the term "undue hardship" appearing in section 701(j) of Title VII.

Constitutionally, a religious accommodation may be required so long as available accommodations would not cause the employer substantial economic burden or impose significant burdens on other employees. In the instant case, there were neither substantial economic burdens placed on the Police Department's operations nor were there significant impositions placed on coworkers. Absent such a showing, the Eleventh Circuit's decision is clearly erroneous.

II. THE COURT OF APPEALS COMMITTED MANIFEST ERROR IN CREATING, BY JUDICIAL FIAT, AN EXEMPTION FROM TITLE VII'S RELIGIOUS ACCOMMODATION REQUIREMENT FOR MUNICIPAL LAW ENFORCEMENT AGENCIES.

Concluding the Police Department need only show more than a *de minimis* burden, rather than *Hardison*'s "more than *de minimis* costs," the trial court determined that "requiring the Department to grant shift exceptions to Beadle would be to incur a greater than *de minimis* cost because of the public

health, safety and welfare considerations associated with police work." (App. at 27a-28a). The court did not rely on any evidence of adverse public health, safety, or welfare consequences but simply made a per se determination that law enforcement positions are exempt from Title VII accommodation requirements. The court "interpret[ed] *Trans World Airlines, Inc. v. Hardison* to provide that Title VII does not require a law enforcement agency of the nature of the City of Tampa Police Department to grant its law enforcement officer a permanent weekly religious accommodation to the exclusion of his or her fellow officers." (App. at 27a). But the courts below ignored the fact that *Hardison* rejected such a per se conclusion. As noted in *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116, 119 (4th Cir. 1988):

> The Supreme Court in *Hardison* held that the employer, TWA, could not reasonably accommodate the employee's refusal to work on his Sabbath without undue hardship. TWA, however, made several efforts to accommodate the employee. Job swaps, change of days off, and shift transfers were all attempted before TWA concluded that any further accommodation would create an undue hardship.

Only after it reviewed the *extent* of the accommodation efforts made by TWA did the *Hardison* Court conclude that the cost to the employer was more than *de minimis*. *Hardison* found the accommodation suggested by the court of appeals -- the substitution of "other available employees through the payment of premium wages," 432 U.S. at 84 -- would result in more than *de minimis* cost. The Court then concluded "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.*

The Eleventh Circuit, like the trial court, concluded an employer is not required to search for an accommodation, noting that "the Department is charged with protecting the health, safety, and welfare of its citizenry." (App. at 9a). However, such a blanket exemption for law enforcement agencies is hostile to the language and purpose of Title VII and is unsupported by case law. The text of Title VII does not exempt law enforcement or public health and safety agencies. To the contrary, in 1972 Congress extended Title VII to cover state and local government "employers" when it added 701(j) to the statute. *See* 118 Cong. Rec. 7166 (Section by Section Analysis of H.R. 1746) (noting definition of "employer" "would now include all State and local governments, governmental agencies and political subdivisions").

Section 701(j)'s religious accommodation provision clearly requires all "employers" short of undue hardship, to make scheduling adjustments for Sabbatarian employees. Contrary to the trial court's assumption and the court of appeals' determination, these amendments extend Title VII coverage to governmental agencies, including police departments. These public employers are bound by the same standard as private employers.

The Eleventh Circuit relies on *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). However, that case is distinguishable from this case. There the Tenth Circuit rejected a per se finding of undue hardship and instead found "[e]ach case necessarily depends upon its own facts and circumstances." In contrast to the Eleventh Circuit's decision here, although the *City of Albuquerque* court recognized that a fire department is involved in serious public life-saving and property protection, it nevertheless applied the same undue

hardship standard required for private employers. Thus, the nature of the defendants' business is merely one of the factors courts will consider in evaluating reasonable accommodation and undue hardship, yet using the same standard for both.

Here a reasonable accommodation for Beadle was possible. Department personnel admitted it would not have been detrimental to Beadle's training nor adversely affect the training program for Beadle to remain on Sergeant Dawson's squad the full 16 weeks instead of transferring to another training officer. That is the exact way the training program operated at the time discovery was taken in this case (Cook Dep. R2-66-43:22-44:10; 126:18-129:20).

Another accommodation alternative was equally feasible. There were field training officers ("FTOs") in each of the non-training squads. Beadle could have been placed in a non-training squad and assigned to an FTO qualified person in any sector of the City for any additional training required by the Department (*id.* at 123:14-125:9). And there were non-training squads to which Beadle could have been assigned that would not have required him to work his Sabbath (*id.* at 117:7-119:7; *see also* DX 20). Because all training officers received special pay while in the training program, it would not have increased training costs.

One additional means of accommodation would have been to extend Beadle's training for a short time to allow for any training deficiencies. This could have been accomplished in any sector of the City. The Department extended training for some recruits when the recruit exhibited such a need. The Department would use a different training officer, which did not cause a consistency problem (Pegram Dep. R2-62-81:3-82:12). Because extended training was offered for periods of four to eight weeks for other recruits (Cook Dep. R2-66-45:9-

47:25), any extra cost incurred in providing Beadle extended training would not be the type of financial cost referred to in *Hardison* because it would not confer a privilege not provided to other recruits for non-religious reasons.

In *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981), the court stated "[a] claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on co-workers or disruption of the work routine.'" (Citation omitted.) (*See also Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1086 (6th cir. 1987).) But here the court made no finding of actual imposition on coworkers or disruption of the work routine. In fact, the court of appeals found directly to the contrary (App. at 27a).

The court in *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) (citing *Tooley*, 648 F.2d at 1243), stated "[t]he *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case." But the courts below made no such assessment. Beadle does concede, as the court stated in *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973), that "[a]s the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases." However, that does not excuse the courts' failure to apply the statute's "reasonable accommodation/undue hardship" standard. Nor does it eliminate the need for the trial court to quantify the extent of the claimed resulting hardship.

It is not enough for the trial court to find that granting shift exceptions or changing from a random assignment of recruits would result in some type of generalized minimal "cost" to the

public health, safety, and welfare. Rather, at a minimum, the court should have considered the Department's evidence of hardship, including the particular requirements of the job in question and the impact on the law enforcement agency. The court then should have made specific findings crediting or rejecting that evidence as it related to the specific accommodations Beadle proposed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this petition be granted and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Dated: April 17, 1995

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 93-3271.

ASTON A. BEADLE,
Plaintiff-Appellant, Cross-Appellee,

v.

CITY OF TAMPA, a Florida municipal corporation;
and the Tampa Police Department,
Defendants-Appellees, Cross-Appellants.

**Appeals from the United States District Court
for the Middle District of Florida.**

Jan. 18, 1995.

Former police officer sued city and police department for religious discrimination. The United States District Court for the Middle District of Florida, No. 91-1316-CIV-T-17(A), Elizabeth A. Kovachevich, J., after bench trial, held that city met its obligations under Title VII. Former officer appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, sitting by designation, held that: (1) magistrate court's finding that officer did not knowingly and voluntarily waive his Title VII rights was not clearly erroneous, and (2) requiring department to grant excep-

tions to officer would have resulted in greater than de minimus cost.

Affirmed.

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON *, Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

Aston Beadle appeals the magistrate court's [1] final judgment in favor of the City of Tampa and Tampa Police Department. The court rejected Beadle's claim that the Department violated Title VII by failing to accommodate his religious practices and by constructively discharging him because of his refusal to work on his Sabbath. The City and Department cross-appeal the court's finding that Beadle did not knowingly and voluntarily sign a release waiving his Title VII rights. We AFFIRM.

I. BACKGROUND

At all times relevant to this lawsuit, Beadle was a practicing member of the Seventh Day Adventist Church. One of the tenets of this faith is the prohibition of secular labor on its Sabbath—from sundown Friday until sundown Saturday. Beadle passed the City of Tampa's civil service examination, and the Tampa Police Department accepted his employment application. Although aware of his religious practices and the resulting limitations on his work schedule,[2] the Department made no promises to Beadle that he would not be required to work on his Sabbath.

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* Honorable Floyd R. Gibson, Senior U.S. Judge for the Eighth Circuit, sitting by designation.

[1] The parties consented to trial by the magistrate judge.

[2] When he was hired, the Department was also aware that Beadle had a religious discrimination claim pending against his prior employer, the Hillsborough County Sheriff's Office.

Beadle successfully completed the Tampa Police Academy and began the Department's field training program. The sixteen weeks of field training consisted of four phases: a two-week orientation period in which a recruit patrolled a particular area of the city with a field training officer; a four-week period graded by the initial training officer; two four-week periods in which a recruit was assigned to other training squads with different field training officers; and a two-week period and evaluation with the recruit's original field training officer. The Department assigned recruits to several different training officers during the course of their training so that the recruits could experience varying methods of supervision and observe other patrol areas in the city.

At the time of Beadle's field training assignment, all of the Department's patrol squads, including the training squads, were scheduled to work for four ten-hour days followed by three days off. Every eight weeks, the shift schedules rotated forward one day. The Department did not allow recruits to use vacation or leave time during their first six months of employment and did not allow any of its employees to trade days off.

Beadle was randomly assigned to a training squad that worked Friday through Monday, with Tuesday, Wednesday, and Thursday as his days off. During his first week of field training, Beadle requested the upcoming Saturday off from work in order to observe his Sabbath. Although the Department granted this request, Beadle's supervisor explained to him that future time off may not be possible. The following week, the Department denied Beadle's request for Saturday off. Beadle met with his supervisors and advised them that he would be forced to resign from the Department if he was required to work on his Sabbath. Beadle's supervisors informed him that he must work his assigned shift and that he would not be transferred to another training squad. Beadle then tendered his resignation.

During orientation, Beadle had signed a contract that provided if he left the Department and secured

employment with another law enforcement agency within two years "from commencement of full-time service as a police officer subsequent to completion of the period of field training," he was obligated to reimburse the City for his hiring and training expenses (approximately $12,000.00). When Beadle submitted his resignation letter, one of his supervisors provided him with a document where in Beadle agreed not to sue the City or the Department for any matters related to his former employment in exchange for the City's promise not to pursue reimbursement for his hiring and training expenses. Beadle reviewed this document for less than thirty minutes and signed it without consulting an attorney.

Beadle then brought this lawsuit against the City and Department, alleging that he was constructively discharged because the defendants failed to reasonably accommodate his religious practices. Beadle claimed that the Department could have assigned him to a field training officer who worked Sunday through Wednesday and had Thursday, Friday, and Saturday off. If he had stayed with this training officer and had not switched during the third phase of training, then he would have been able to observe his Sabbath during the entire sixteen-week training program. Once he had completed his field training, Beadle claimed that the Department could have assigned him to a position with the "downtown squad"—a group of officers who worked only Monday through Friday. The City and Department argued that Beadle had waived his Title VII rights by signing the release, and that in any event, its use of a neutral rotating shift schedule was a reasonable accommodation of Beadle's religious practices. Alternatively, the defendants argued that accommodating Beadle would have created an undue hardship.

After a four-day bench trial, the magistrate found that Beadle did not knowingly and voluntarily waive his Title

VII rights. The magistrate then determined that requiring the Department to grant shift exceptions would result in a greater than *de minimis* cost because of the public health, safety, and welfare considerations associated with police work and that the Department's use of a neutral rotating shift system was a reasonable effort to accommodate Beadle under Title VII. "[E]valuat[ing] reasonable accommodation and undue hardship in light of the employment context of each case, the Court is unable to find any authority which would require a public health or safety agency to grant such an employee an exception from the customary neutral rotating shift system used by law enforcement agencies in order to accommodate the Sabbath requirements of the officer." *Beadle v. City of Tampa,* No. 91-1316, slip op. at 20 (M.D.Fla. Oct. 1, 1993) (unpublished). The magistrate concluded that the City had met its obligation under Title VII and entered judgment in favor of the defendants.[8] Beadle appeals, and the City and Department cross-appeal.

II. DISCUSSION

A. Release and Waiver

As a preliminary matter, we address the issue of whether Beadle has waived his Title VII rights. An employee may validly waive his Title VII rights in a private settlement with his employer if he knowingly and voluntarily consents to the release. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 52 n. 15, 94 S.Ct. 1011, 1022 n. 15, 39 L.Ed.2d 147 (1974). In determining whether a release was knowingly and voluntarily en-

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[8] Beadle's discrimination lawsuits against the Hillsborough County Sheriff's Department and the Tampa Police Department were tried *ad seriatim.* The court also entered judgment in favor Hillsborough, and this Court affirmed in *Beadle v. Hillsborough County Sheriff's Dep't,* 29 F.3d 589 (11th Cir.1994).

tered, the factors that guide a court include: the plaintiff's education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled. *Gormin v. Brown-Forman Corp.*, 963 F.2d 323, 327 (11th Cir.1992) (citing *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924, 110 S.Ct. 292, 107 L.Ed.2d 272 (1989)).

In this case, the magistrate noted that Beadle spent a short amount of time reviewing the document and that he did not consult with an attorney. Although the Department did not discourage Beadle from consulting with an attorney, given Beadle's stressful financial situation, the magistrate was unconvinced that he had a fair opportunity to do so. Moreover, the contract for reimbursement created a financial obligation when a recruit secured other law enforcement employment within two years after completing field training and commencing full-time service. Because Beadle had never completed his field training and started full-time service, he was arguably never indebted to the City for his hiring and training expenses. After examining the record, we cannot conclude that the magistrate court clearly erred in finding that Beadle did not knowingly and voluntarily sign the release waiving his Title VII rights.

B. Reasonable Accommodation and Undue Hardship

Title VII of the Civil Rights Act of 1964, as amended, prohibits an employer from discriminating against an employee on the basis of "race, color, religion, sex, or nation origin." 42 U.S.C. § 2000e-2(a)(1). The statute defines the term "religion" to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). "The employer violates the statute

unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.'" *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68, 107 S.Ct. 367, 372, 93 L.Ed.2d 305 (1986) (quoting 42 U.S.C. 2000e(j)).

Recognizing that the phrases "reasonable accommodation" and "undue hardship" are not defined under the statutes, "[e]ach case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably." *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir.1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1092 (1977). Once an employer demonstrates that it reasonably accommodated an employee's religious needs, the statutory inquiry ends. *Ansonia*, 479 U.S. at 68, 107 S.Ct. at 371-72. "[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship." *Id.* at 68-69, 107 S.Ct. at 372. The Supreme Court has described "undue hardship" as any act requiring an employer to bear more than a "*de minimis* cost" in accommodating an employee's religious beliefs. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 n. 15, 97 S.Ct. 2264, 2277 n. 15, 53 L.Ed.2d 113 (1977). The Court has also recognized that the phrase "*de minimis* cost" entails not only monetary concerns, but also the employer's burden in conducting its business. *Id.*

On appeal, the parties concentrate their arguments on whether the Department's neutral rotating shift system was a reasonable accommodation.[4] We believe, how-

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[4] The City and the Department do not dispute the court's finding that Beadle established a prima facie case of religious discrimination: (1) that he had a bona fide belief that compliance with an employment requirement would be contrary to his religious belief or practice; (2) that he informed his employer about the conflict; and (3)

ever, that the parties have unduly focused their arguments on the system itself and ignored the magistrate's determination that requiring the Department to grant shift exceptions to Beadle would result in a greater than *de minimis* cost in light of the public health, safety and welfare considerations associated with police work.

Relying on *Beadle v. Hillsborough County Sheriff's Dep't,* 29 F.3d 589 (11th Cir.1994), the City and Department argue that a neutral rotating shift system is necessarily a reasonable accommodation. However, in addition to a neutral rotating shift system, the Hillsborough County Sheriff's Department allowed its employees to trade days off.[5] In *Hillsborough,* this Court concluded that "voluntary swaps instituted by employers within neutral rotating shift systems constitute reasonable accommodations under Title VII." *Id.* at 593.

Aside from granting Beadle his first Saturday off from work, the magistrate found that the Department did nothing to accommodate Beadle other than the neutral rotating shift system. The magistrate also noted that Title VII does not require an employer to assure that an employee has the opportunity to observe his religious practices at all costs. We believe that the magistrate's decision was correctly founded on its analysis of undue hardship, rather than on reasonable accommodation.

Our reading of the magistrate's judgment finds support in the fact that the court heavily relied on *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), a case involving undue hardship. *See Ansonia,* 479 U.S. at 68-69, 107 S.Ct. at 371-72 ("As *Hardison* illustrates, the extent of undue hardship on

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that he was discharged or penalized for failing to comply with the conflicting employment requirement. *See Beadle v. Hillsborough County Sheriff's Dep't,* 29 F.3d 589 (11th Cir.1994).

[5] In the case at hand, the issue of whether employees were allowed to trade days off is a red herring; recruits were not considered part of the regular work assignment and were not replaced when absent.

the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."). In *Hardison*, the Supreme Court explained:

> [i]t was essential to [the employer]'s business to require Saturday and Sunday work from at least a few employees even tough [sic] most employees preferred these days off. . . . In considering criteria to govern this allocation, [the employer] had two alternatives: *adopt a neutral system*, such as seniority, a lottery, or *rotating shifts;* or allocate days off in accordance with the religious needs of its employees. [The employer] would have had to adopt the latter in order to insure [plaintiff] and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends. . . .
>
> Title VII does not contemplate such unequal treatment. . . . It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

432 U.S. at 80-81, 97 S.Ct. at 2275 (emphasis added).

The Tampa Police Department is a twenty-four hour a day, seven-day a week, three hundred sixty-five day a year agency that must allocate work schedules among over nine hundred employees. More importantly, the Department is charged with protecting the health, safety, and welfare of its citizenry. The Department chose to implement a rotating shift schedule, randomly assign recruits to shifts, and expose its recruits to a variety of

training officers. In order to accommodate Beadle's religious practices, the Department would have been forced to assign him to another training squad and to not reassign him during the third phase of training. Beadle admits that he would not have experienced the educational benefits of working with different training officers, but argues that this phase of the training was not very important.[6]

We agree with the magistrate court's refusal to interfere with the Department's scheduling and training programs. When the employer's business involves the protection of lives and property, "courts should go slow in restructuring [its] employment practices." *Albuquerque*, 545 F.2d at 114. We conclude that the magistrate court did not err when it found that requiring the Department to grant shift exceptions would result in a greater than *de minimis* cost and that the City had met its obligation under Title VII.

III. CONCLUSION

Accordingly, we AFFIRM the magistrate court's judgment.

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[6] The fact that the Department later changed its field training program and eliminated this part of the training process is irrelevant.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 91-1316-Civ-T-17(A)

ASTON A. BEADLE,

Plaintiff,

-vs-

CITY OF TAMPA, FLORIDA, a Florida municipal corporation, THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

Defendants.

OPINION

This is an action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq. (Title VII) involving the extent of an employer's obligation to accommodate the religious beliefs of its employee. The case was tried to the Court on June 25-28, 1993.

The Court is of the opinion that judgment should be entered in favor of the defendant based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

The plaintiff, Aston A. Beadle, is a member of the Seventh-Day Adventist faith. One of the tenets of the faith is the prohibition of work on the Sabbath, which

commences at sundown on Friday and ends at sundown on Saturday. Seventh-Day Adventists refrain from routine work on the Sabbath, although a Seventh-Day Adventist may engage in emergency or humanitarian work on that day. Beadle, after successfully completing the City of Tampa Police Academy resigned as a police officer trainee on Friday, June 24, 1988 when he was advised that the City would not grant him the next day, the Sabbath, off. Beadle contends that the order to work or resign resulted in his constructive discharge in violation of Title VII because the City failed to make a reasonable accommodation of his faith's tenets. The City contends that it made efforts to reasonably accommodate Beadle's religious beliefs.

The Department employs over 900 individuals, 713 of which are sworn personnel. Its patrol law enforcement operations are conducted through its two "uniformed districts or divisions".

On January 26, 1987, Beadle took and passed the City's civil service examination to be a police officer. He was then subjected to the standard background investigation conducted by the Personnel Bureau. At the time, the manager of the Personnel Bureau was Captain Joseph Walker. Three investigators participated in Beadle's background investigation including: Sergeant Polly Goethe (now Horne), Officer Carl Anderson and Detective Stephen Brock.

Law enforcement was Beadle's life work. He was originally born in Jamaica and served in the Jamaican Police Department for two years prior to coming to the United States. He also served a brief stint with the Hillsborough County Sheriff's Department. In fact, at the time that he was hired by the City, Beadle had charges pending against the Hillsborough County Sheriff's Office as a result of his discharge for failing to work on the Sabbath. The pendency of this claim was known by the City during its investigation of Beadle's application.

Beadle advised Detective Anderson during consideration of his application of his need to have the Sabbath off. No promises were made, but Detective Anderson advised that accommodations were possible.

Beadle's application was brought to the attention of the Chief of Police, A. C. Mclain, who directed the City's legal counsel to render a legal opinion as to whether the City was required to hire Beadle. Based on a legal opinion of Assistant City Attorney Ernest Mayor, Jr., an offer of employment was extended to Beadle. The opinion stated:

> In my opinion, Mr. Beadle should not be treated any differently from any other police applicant. He should be advised that like any other police officer, he will be expected to work on his assigned shifts. The Department should make it clear to Beadle that it is not in any way promising any type of accommodation of his religious beliefs. Mr. Beadle should be made to understand that he will be treated in the same manner as any other police recruit or probationary officer, i.e., he will not be entitled to use any leave during his probationary status.

Against the recommendation of Sergeant Goethe and Captain Walker, Beadle was hired. He completed the Academy, reported for orientation and began field training. Beadle believed that the City would make efforts to accommodate his religious beliefs by allowing him the Sabbath off. Included among the forms Beadle was required to sign at orientation was a document entitled "Binding Contract for Reimbursement of Hiring and Training Expenses". This contract provided, among other things, that in the event Beadle, after having received the benefit of the City's training, should secure employment with another law enforcement agency within two years after his termination of employment with the City, he would be obligated to reimburse the City for the

expenses of his training, which was approximately $12,000.00.

The Academy lasted sixteen weeks. Then the Academy graduates were randomly assigned by the Personnel Bureau to the Patrol Division's training squads. Beadle was assigned to Uniform Division II which was commanded by Major E. F. Pegram. He was assigned to a training squad commanded by Sergeant Douglas Cook. The assignment of a police recruit to a training squad was, according to Sergeant Cook, made on a random basis. At the time of Beadle's assignment, all of the City's patrol squads, including the training squads, were scheduled to work four, ten-hour days with three-days off. The days for such squads rotated forward one day every 56 days.

The particular training squad that Beadle was assigned to had Tuesdays, Wednesdays and Thursdays off. Beadle was not assigned to the training squad that had the weekend days off, even though it was known that he was a Seventh-Day Adventist who did not wish to work on Saturdays.

The Field Training Program consisted of four phases for a total of sixteen weeks. The first phase consisted of a two-week orientation period within which the recruit would not be graded but was merely to ride with a field training officer in order to acquaint him with certain types of calls in the area of patrol. The next portion consisted of a four-week training period within which ~~the recruit~~ would be graded by his or her field training officer. During this initial six-week period, the recruit was assigned to his initial training squad, and in Beadle's case, the first six weeks would have been spent on Sergeant Cook's squad. The next two training phases consist of two four-week periods in which the recruit is assigned to a "sister" training squad and to a different field training officer. According to the City, the value of the change during this "swap" is to allow the recruit to

see different methods of supervision and different methods of training from different officers. The City also contends that this method of training allows the officer to patrol different areas of the City. During the final two-week phase of the program, the recruit returns to his or her original squad and to his or her original field training officer to complete the evaluation and field training.

Had Beadle been assigned to Sergeant's Dawson's squad instead of Sergeant Cook's, he would have his days off on Thursday, Friday and Saturday during the first 56-day cycle. No reason was given for Beadle's assignment to Sergeant Cook's rather than Sergeant Dawson's squad other than it was a random assignment and no accommodations would be made for Beadle.

During his first week of field training, Beadle asked for the upcoming Saturday off for the observance of his Sabbath. His request was granted by Major Pegram on June 17, 1988, albeit without a promise for such accommodations in the future. Beadle made the same request the next week and after a series of meetings with the City's command including Captain Walker, Colonel George Fox, Deputy Chief Curtis Lane, Chief Mclain and Major Pegram, the request was denied.

Upon denial of this request, Beadle met with Major Pegram to advise him that he wished to resign from the police department if his Sabbath accommodation was not met. There was discussion regarding a transfer to another squad, however, this request was denied. The explanation given to Beadle was that if his request for a specific day off was granted, the Department would then have to concern itself with accommodating similar requests made by others. At a meeting in Chief Mclain's office on June 21 or 22, the Chief pointed his finger in Beadle's direction and said "you will work your shift."

Beadle met with Major Pegram on June 24, 1988 at which he submitted his letter of resignation. The letter stated:

> I hereby submit my resignation from the Tampa Police Department as a police officer, effective at the end of my tour of duties Friday, June 24, 1988, for the following reasons:
>
> I am a member of the Seventh-Day Adventist Church. The 7th day is celebrated as a religious holiday, so taught by the Bible in both the old and new Testament. As a member, I am required to obstain [sic] from routine work day activities, with some exceptions.
>
> All this, I personally communicated to the Department (TPD) before I was hired. Upon being promoted to police officer, I observed that the rotation of my day's-off was not in agreement with my request, that one of my day's-off be Saturdays for the reason aforementioned.
>
> I immediately took my request through the appropriate chain of command. I was told that my request will not be considered.
>
> In view of the intransigent position taken by the Department I see no alternative but to submit my resignation. This I have done with great distress, since it was my hope to serve my City prudently.
>
> Respectfully submitted, Aston A. Beadle.

At this meeting, Major Pegram presented Beadle with a waiver and release concerning Beadle's financial obligations for the cost of his training. This release provided that in exchange for the City's release of Beadle from his financial obligations for the cost of his training, Beadle agreed not to sue the City for any matter relating to his employment. The waiver and release states:

I, Aston Beadle, do hereby resign my employment with the City of Tampa Police Department. By signing this document, I represent to the City of Tampa and to my superiors at the police department that I submitting this resignation freely and voluntarily, without any coercion or duress to do so.

I further acknowledge my financial obligation to the City of Tampa for reimbursement of those amounts spent by the City of Tampa on my training. However, I have been informed that the City will forego the collection of those monies in exchange for my promise not to sue or press any claim for any matter involving or related to my employment with the City of Tampa. By signing this document, I hereby waive and completely release the City of Tampa, the City of Tampa Police Department, and all officials, officers, employees, and agents of the City of Tampa from any and all liability under any federal or state law or local ordinance relating to employment, including but not limited to laws relating to labor organizations, civil service, collective bargaining (including the collective bargaining agreement in existence between the City of Tampa and the (PBA), and all laws relating to employment discrimination including but not limited Title VII, the Age Discrimination and Employment Act, the Rehabilitative (sic) Act of 1973 and the Florida Human Relations Act.

I have signed this paper freely and voluntarily on this 24th day of June, 1988.

/s/ Aston A. Beadle

At the trial, plaintiff testified that he understood the release to mean that if he signed it, the City could not hold him liable for the training costs and he could not sue the City for, among other things, religious discrimination. He testified that he read the release and felt that signing it was the best thing for him to do at the time.

He also testified that he felt, at the time, that he was under financial obligation to the City. Beadle further testified, however, that he was under severe financial distress as a result of his prior discharge by the Hillsborough County Sheriff's Department; and he was having marital problems at home, partly resulting from his unstable employment situation. Additionally, his car had just been repossessed and he was unable to pay his bills including his house payments. Although a charge of discrimination was pending, he did not have a relationship with an attorney at the time nor did he seek or obtain the advice of an attorney prior to signing the waiver and release. With respect to the waiver and release, the testimony establishes that Beadle had between fifteen and thirty minutes to consider his options.

At the trial, the City established that it had in the past taken action to collect training expenses from several of its former officers.

It was also established at the trial that a possible permanent accommodation would have been to permit Beadle to work at what was known as the "downtown squad". Officers assigned to this squad worked five days a week during the weekdays and the City's commanders had the prerogative of making assignments to this squad. However, assignment to this squad is only available after completion of the sixteen-week training squad. The attractiveness of this squad depends upon the officer's point of view. The advantage is that there is less report writing and violent confrontation. It is also an advantage that an officer assigned to this squad is off on Saturday and Sunday. The disadvantage is that the squad works five days a week. Also, squad officers are assigned to do background investigations for hiring. These positions are basically Monday to Friday jobs.

At the trial, City command officers testified that assignments to a particular training squad without rotation

is detrimental to the consistency of the training and results in lack of proper training. According to the City, it is extremely important to the continuity of the training that the police officers be trained under different field training officers.

After his termination, Beadle timely filed a charge of discrimination with the Equal Employment Opportunity Commission, received his right to sue letter, and initiated this action.

CONCLUSIONS OF LAW

1. Waiver and Release

As a preliminary threshold issue, the Court must consider whether the release that Beadle signed, in which he agreed to waive his right to sue the City in return for a release from his purported financial obligation for the cost of his training, was valid under the applicable law.

Employees may validly waive their Title VII rights in private settlements with their employers if their consent to a release is both knowing and voluntary. *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 52, 94 S.Ct. 1011, 1021, 39 L.Ed.2d 147 (1974). Although the Circuits are split as to the appropriate source of law to be used in determining the validity of a waiver, the authority most prominently cited, and the leading authority is *Bormann v. A T & T Communications, Inc.,* 875 F.2d 399 (2d Cir. 1989). This case sets forth a "totality of the circumstances" test to assess the validity of a particular release. The Court in *Bormann* indicates that the following factors must be considered: (1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of the plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by counsel or consulted with an attorney, and (6) whether

the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law. *Id.* at 403, (quoting *EEOC v. American Express Publishing Corporation,* 681 F.Supp. 216, 219 (S.D.N.Y. 1988). The fifth factor is modified to include "whether an employer encourages or discourages the employee to consult an attorney and whether the employee had a fair opportunity to do so." *Bormann,* at 403. (citation omitted). *Bormann* additionally states that this list of factors is not exhaustive, but provides guidance for determining whether a particular release is knowing and voluntary.

The City argues that the release is valid because plaintiff was an educated man, was told that he did not have to sign the release if he did not want to, and that the terms of the release are clear. The City further argues that Beadle thought he was being discriminated against when he signed the release, had filed a charge of discrimination with the EEOC and had spoken with an attorney about a charge of religious discrimination against his former employer the Hillsborough County Sheriff's Office. Because Beadle had access to two separate attorneys and understood the consequences of the release, the City argues that the terms of the release should be enforced.

However, having considered the circumstances in their totality, the Court is convinced that the release was not entered into knowingly and voluntarily under the totality of the circumstances. Beadle had possession of the release for no more than thirty minutes and as few as ten minutes before he signed it. He had absolutely no role whatsoever in negotiating the terms of the release. Although he could possibly have contacted his counsel, and there is no evidence to suggest that he was coerced to sign the release, he was not represented by counsel nor did he exercise his opportunity to consult with an attorney. Although he was not discouraged from consult-

ing with an attorney, the Court is unconvinced that he had a fair opportunity to do so, given the stressful situation he faced. The evidence indicates that Beadle, at the time he executed the waiver, was suffering from severe financial and domestic problems. He was terminated from his prior position with the Hillsborough County Sheriff's Office, he was undergoing marital and domestic problems at home and his car had been repossessed. He was faced with the difficult choice of the surrender of his job or the surrender of his religion.

More importantly, the Court is not convinced that there was an actual financial obligation due from Beadle to the City between the time of his termination (or resignation) and the execution of the waiver. According to the "Binding Contract For Reimbursement Of Hiring and Training Expenses" that Beadle signed at the time of the commencement of his employment, liability for training expenses would have arisen only in the event that he accepted employment with another law enforcement agency within the State of Florida within twenty-four months from the commencement of full-time service as a police officer subsequent to the completion of the field training period. At the time that Beadle signed the waiver of release, he thought that there was an existing financial obligation which he owed to the City. Pegram's conversations with him at the time of his resignation led him to believe that he owed the City money. Additionally, the Court is not convinced that a financial obligation was due to the City **prior to the commencement of full-time service** after completion of the field training program. Further, the release is not mutual in that a representative of the City did not sign it, agreeing to refrain from holding Beadle responsible from any financial obligation. Considering all of these factors in totality, the Court is of the opinion that Beadle did not intelligently and voluntarily sign the release waiving his Title VII rights.

2. The Title VII Claim

The parties stipulated in their pretrial statement that this Court has jurisdiction of this action pursuant to 42 U.S.C. § 2000e-5(f)(3). The parties further agree that at all times pertinent to this action, the City was Beadle's "employer" and that Beadle was an "employee" as those terms are defined in 42 U.S.C. §§ 2000e(b) and 2000e(f), respectively. Additionally, the parties stipulate that Beadle satisfied the administrative prerequisites to maintaining this action.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), makes it unlawful for an employer to discriminate against an employee or prospective employee on the basis of that individual's "race, color, religion, sex, or national origin." The term "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

To establish a prima facie case of religious discrimination, a plaintiff must demonstrate: (1) that he or she had a bona fide belief that compliance with an employment requirement would be contrary to his or her religious belief or practice; (2) that he or she informed the employer about the conflict; and (3) that he or she was discharged or penalized for failing to comply with the conflicting employment requirement. *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 144 (5th Cir. 1982) [1].

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[1] This opinion is a decision of the Fifth Circuit which is accorded only persuasive authority in the Eleventh Circuit. *See Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

Murphy v. Edge Memorial Hospital, 550 F.Supp. 1185, 1187-88 (M.D. Ala. 1982). The City does not contest the sincerity of Beadle's religious beliefs. Further, the Court finds from the evidence that Beadle's religious beliefs, with respect to Saturday work requirements, conflict with the employment requirements of the City and that Beadle informed the City of the conflict. The Court further finds that based upon the record of facts, Beadle was constructively discharged since he was forced into an involuntary resignation as a result of the inability to comply with his religious beliefs. *See Young v. Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975).[2]

After a Title VII plaintiff has established a prima facie case, the defendant must show that it offered the plaintiff a reasonable accommodation of his or her religious practices, or that any accommodation of the plaintiff's practices would result in undue hardship to the employer. 42 U.S.C. § 2000e(j). *Murphy v. Edge Memorial Hospital, supra*, 550 F.Supp. at 1188.

"The duty to accommodate requires that the employer take affirmative steps to explore and implement alternatives which would satisfy an employee's religious practices without (1) compromising the employment entitlements of other employees or (2) conferring a privilege on the employee the cost of which is more than **de minimis.**" *Murphy v. Edge Memorial Hospital, supra*, 550 F.Supp. at 1188.

Since a prima facie case is established, the specific issue presently before the Court is whether the City could have reasonably accommodated Beadle's religious needs without incurring undue hardship. To resolve this

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[2] Pursuant to *Bonner v. City of Prichard, Alabama, supra*, decisions of the former Fifth Circuit entered prior to the split establishing the Eleventh Circuit are binding in the Eleventh Circuit.

issue, the Court relies upon *TransWorld Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). In that case, Larry G. Hardison, a follower of the Worldwide Church of God, sued TransWorld Airlines (TWA) and the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), claiming that TWA violated Title VII by failing to reasonably accommodate his religious beliefs. Hardison, like Beadle, belonged to a religion requiring observance of the Sabbath from sundown Friday to sundown Saturday. TWA discharged him without accommodating his request to have these days off since shift assignments at its Kansas City, Missouri facility were based on a seniority system in accordance with a collective bargaining agreement. Due to Hardison's comparatively low seniority, the union's unwillingness to modify the system on Hardison's behalf, Hardison's religious belief could not meet an accommodation absent payment of overtime to another substitute employee or forcing the supervisor to take Hardison's place. The TWA facility to which Hardison was assigned operated twenty-four hours a day throughout the year.

The Supreme Court found that the evidence established an absence of volunteers to relieve Hardison on Saturdays and to give him Saturdays off, would have deprived another employee of his or her shift preference "at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *TransWorld Airlines, Inc. v. Hardison, supra*, 432 U.S. at 81, 97 S.Ct. at 2274. The Court concluded: "Absent a discriminatory purpose", the operation of a neutral scheduling system which was designed to meet the needs of all employees, "cannot be an unlawful employment practice even if the system has some discriminatory consequences." *TransWorld Airlines, Inc. v. Hardison, supra*, 432 U.S. at 82, 97 S.Ct. at 2276. The Court found that an employer is not required by Title VII to alter such a neutral scheduling system to meet the religious practices of an employ-

ee, but may satisfy the reasonable accommodation requirement by demonstrating efforts to accommodate an employee within the neutral system. According to the Court in *Hardison*, "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *Trans-World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 81, 97 S.Ct. at 2274. The Court evaluates reasonable accommodation in light of the employer's ability to accommodate an employee within the framework of the system established without denying the benefits of the system to other employees or incurring a greater than **de minimis** cost. As stated in *Murphy v. Edge, supra,* an accommodation is not required under Title VII when: (1) the accommodation will deprive the benefits of the neutral scheduling system to any other employee, or (2) will require the employer to incur a greater than **de minimis** cost." *Murphy v. Edge Memorial Hospital* 550 F.Supp. at 1189.

As stated in *Williams v. Southern Union Gas Company,* 529 F.2d 483, 489 (10th Cir.), *cert. denied,* 429 U.S. 959, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976), the phrases "reasonably accommodate" and "undue hardship" are relative terms that cannot be given any hard and fast meaning. "Each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably." *United States v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir.) *cert. denied,* 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1092 (1976).

In the *United States v. City of Albuquerque, Id.,* the religious discrimination issue was faced by a public employer, i.e., the City's Fire Department. In that case,

the Court noted that "the 'business' was that of fire suppression, and such is obviously a matter of great public interest." *Id.* at 114. The interest is "in protecting the lives and property of a dependent citizenry". To that extent, that Court determined that Courts should "go slow in restructuring . . . employment practices." *Id.*

In the present case, Beadle was assigned to an initial training squad which gave him Tuesdays, Wednesdays and Thursdays off but not the days of his Sabbath. Had he been assigned to the other training squad, he would have had his Sabbath days off initially, but since the training squads are rotated, ultimately he would have been required to work on a Sabbath Day. Unlike his prior employment, (Hillsborough County Sheriff's Office), the City did not allow Beadle to swap days off with other employees, relying upon the integrity of its training program which requires exposure to a variety of training officers. Clearly, other than granting him his first Saturday off of his training period, the City made absolutely no accommodations whatsoever to Beadle's religious needs other than the benefits of its neutral rotating shift system. The City contends, however, that because of the particular nature of police work, accommodating an employee outside of the neutral rotating shift system would deprive the benefits of the system to other employees and result in a greater than **de minimis** cost to the City. Although the cases reflect the view that the trial court must evaluate reasonable accommodation and undue hardship in light of the employment context of each case, the Court is unable to find any authority which would require a public health or safety agency to grant such an employee an exception from the customary neutral rotating shift system used by law enforcement agencies in order to accommodate the Sabbath requirements of the officer.

In an action by a FBI agent against the United States Department of Justice claiming religious discrimination

under Title VII due to denial of Sabbath observance requirements, the Seventh Circuit concluded "[c]ompelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it." *Ryan v. U.S. Department of Justice,* 950 F.2d 458, 462 (7th Cir.), *cert. denied,* 112 S.Ct. 2309, 119 L.Ed.2d 230 (1991).

Beadle argues that other positions were available in the City of Tampa Police Department, such as what is known as the "downtown squad", assignment to which would accommodate his religious beliefs, but that the City took an "intransigent" position by failing to afford him an assignment to such a position. However, Beadle never gave the system an opportunity or a chance to work for him. He may have been eligible for such an assignment after completion of his training. Deputy Chief Curtis Lane encouraged him to do so but Beadle's conscience would not allow him to do so.

The Court interprets *TransWorld Airlines, Inc. v. Hardison* to provide that Title VII does not require a law enforcement agency of the nature of the City of Tampa Police Department to grant its law enforcement officer a permanent weekly religious accommodation to the exclusion of his or her fellow officers. The City of Tampa Police Department is a 24-hour a day, seven-day a week, 365-day a year agency with public health, safety and welfare responsibilities. The Court is unable to conclude that the accommodation of a transfer of Beadle to another training shift would have deprived another police trainee of the benefits of the neutral scheduling system since the evidence did not establish that a swap was necessary, at least at the training stage. However, the Court concludes that requiring the Department to grant shift exceptions to Beadle would be to incur a greater than **de minimis** cost because of the public health, safety and welfare considerations associated with

police work. Title VII does not require the employer to assure the individual the opportunity to observe religious practices at all costs. *See Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986). In the present case, the City met its obligation under Title VII when it offered the neutral shift rotating system as a reasonable accommodation to Beadle.

Accordingly, the Court directs the Clerk to enter judgment for the defendant.

ORDERED on this 1st day of October, 1993.

/s/ Charles R. Wilson
CHARLES R. WILSON
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case Number 91-1316-Civ-T-17(A)

ASTON A. BEADLE,

V.

CITY OF TAMPA, FLORIDA,
a Florida municipal corporation,
THE CITY OF TAMPA, FLORIDA
POLICE DEPARTMENT

JUDGMENT IN A CIVIL CASE

[Filed Oct. 4, 1993, 9:08 am, U.S. District Court, Middle District of Florida, Tampa Division (Clerk's stamp(RJH))]

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court. [A]nd a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on behalf of defendant, The City of Tampa, Florida and The City of Tampa, Florida Police Department.

October 1, 1993
Date

DAVID L. EDWARDS
Clerk
/s/ Rebecca J. Hockett
(By) Deputy Clerk

APPENDIX D

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEWARK AREA OFFICE
[SEAL] 60 PARK PLACE
NEWARK, NJ 07102

Charge Number 15189001C

Aston A. Beadle
15 Tentmill Lane
Pikesville, MD 21208

Charging Party

v.

City of Tampa Police Department
1710 Tampa Street
Tampa, Florida 33608

Respondent

DETERMINATION

Under the authority vested in me by the Procedural Regulations of the Equal Employment Opportunity Commission (EEOC), I issue on behalf of the EEOC the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended (Title VII).

The timeliness and all other jurisdictional requirements have been met. Charging Party alleged that he was discriminated against because of his religion/Seventh Day Adventist in that he was denied religious accommodation and constructively discharged.

The evidence reveals that Charging Party was hired by Respondent on February 22, 1988, as a Police Recruit. On June 12, 1988, Charging Party was assigned as a Police Officer. Effective June 24, 1988, Charging Party constructively resigned from his position.

Charging Party is a Seventh Day Adventist. Charging Party's Sabbath begins on Friday before sundown and lasts until after sundown on Saturday.

The evidence reveals that as a Police Officer, Charging Party had rotating days off. Periodically, Charging Party would be off to observe his Sabbath.

Respondent maintains that Charging Party could not be accommodated because it would be detrimental to the consistency of his training. Charging Party was attending a Field Training and Evaluation Program which is a 16 week program designed to observe and evaluate the probationary officer's training. Charging Party's work schedule required him to work four (4) days and have three (3) days off.

The scheduled work days and off days are not always consecutive. Therefore, Charging Party's training would not be consistent. By allowing Charging Party to work on one (1) of his offdays, so that he could observe his Sabbath, would not have created an undue hardship for Respondent. Respondent had a duty to reasonably accommodate Charging Party and it failed to do so.

Based on this analysis, I have determined that the evidence obtained during the investigation establishes a violation of the statute(s) as follows:

That the Charging Party was denied religious accommodation because of his religion/Seventh Day Adventist.

I have also determined that the evidence obtained during the investigation establishes a violation as to the following:

The evidence substantiates that because of the alleged discriminatory treatment, Charging Party's working conditions became sufficiently intolerable that a reasonable person in Charging Party's position would have resigned.

Based on this analysis I have determined that the evidence establishes a violation of Title VII.

The EEOC now invites the parties to join with it in a collective effort toward a just resolution of the matter pursuant to Section 706(b) of Title VII. A representative of the Commission will contact both parties shortly to initiate the conciliation process.

On behalf of the Commission,

March 30, 1990
Date

/s/ Corrado Gigante
Corrado Gigante
Area Director

APPENDIX E

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

Sec.

1605.1 "Religious" nature of a practice or belief.

1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.

1605.3 Selection practices.

Appendix A to §§ 1605.2 and 1065.3 Background information.

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger,* 380 U.S. 163 (1965) and *Welsh v. United States,* 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in Section 701(j), 42 U.S.C. 2000e(j).

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[1] See CD76-104 (1976), CCH P 6500; CD 71-2620 (1971), CCH P 6283; CD 71-779 (1970), CCH P 6180.

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.*

This section clarifies the obligation imposed by Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under Title VII not to discriminate on grounds of religion, nor other provisions of Title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as § 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.*

(1) Section 701(j) makes it an unlawful employment practice under § 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

(2) Section 701(j) in conjunction with § 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

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[2] See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by Title VII that will most often be required to make an accommodation. However, the principles of Section 1605.2 also apply when an accommodation can be required of other entities covered by Title VII, such as employment agencies (§ 703(b)) or joint labor-management committees controlling apprenticeship or other training or retraining (§ 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) *Reasonable Accommodation.*

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities such as compensation, terms, conditions, or privileges of employment. Therefore, when there

is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for Accommodating Religious Practices.*

(1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in Appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and

labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit com-

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95-390. 5 U.S.C. 5530a, "Compensatory Time Off for Religious Observances."

pliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) Undue Hardship.

(1) Cost.

An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison,* would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is

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[4] *Hardison, supra,* 432 U.S. at 84.

necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra,* 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

§ 1605.3 Selection practices.

(a) Scheduling of Tests or Other Selection Procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries Which Determine An Applicant's Availability to Work During An Employer's Scheduled Working Hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on

these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate Title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification;

and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Supreme Court, U.S.
FILED
MAY 17 1995
CLERK

(2)

No. 94-1705

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Aston A. Beadle,

Petitioner,

v.

City of Tampa,

Respondent.

On Petition for A Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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39 p

QUESTION PRESENTED

I. Whether the Eleventh Circuit erred in affirming the Magistrate Judge's decision when it found that requiring the City of Tampa Police Department to grant special shift exceptions to Plaintiff Beadle so as to accommodate his religious beliefs, that this would result in a greater than de minimis cost to the City, therefore, the City met its obligations under Title VII.

PARTIES TO THE PROCEEDING

Petitioner: Aston A. Beadle

Respondents: City of Tampa Police Department, a division of the City of Tampa

City of Tampa, the employer, is a municipal corporation. Therefore, it has no parent companies or subsidiaries. Respondent makes this declaration pursuant to Supreme Court Rule 29.

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No. 94-1705

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ASTON A. BEADLE,

Petitioner,

vs.

CITY OF TAMPA,

Respondent.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 42 F.3d 633 (11th Cir. 1995).

The Memorandum Opinion of the United States District Court for the Middle District of Florida, Tampa Division, which was entered on October 1, 1994, is unreported and is contained in the appendix at pages 11A-28A in petitioner's Petition for Writ of Certiorari.

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and under 28 U.S.C. § 1331 (general federal question jurisdiction), the petitioner brought this suit in the United States District Court for the Middle District of

Florida, Tampa Division. On October 4, 1993, the district court entered judgment on the merits in favor of the defendants.

On January 18, 1995, in response to petitioner's appeal, the Eleventh Circuit entered a judgment and order affirming the district court's judgment.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as

> well a belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ..

STATEMENT OF THE CASE

A. Relevant Facts

The Defendant, City of Tampa, is a municipal corporation, and at times relevant to this case in 1988, the City's Police Department ("the Police Department") employed 955 individuals. The Police Department conducts its patrol law enforcement operations through its two "uniform" districts or divisions covering different geographical regions of the City. Defendant's Police Department also operates the Tampa Police Academy ("the Academy") to train its patrol officers (R1-41-VIII-D).

During an employee's first year of employment with the Police Department, the officer serves a one year probation (R4-71-182). During the first year of employment, an employee is not entitled to any leave time (R4-71-183). Additionally, the employee is not entitled to any comp time (Id.). No vacation time is available for the first six (6) months (DX 6 at § 19.4)

Plaintiff's terms and conditions of employment were covered by a collective bargaining agreement. Under the terms of the above-described collective bargaining agreement, it provides in § 11.3:

> 11.3 **Work Assignments**. When skill, performance, and ability are equal, and in the sole opinion of the supervisor the tasks to be performed will not be affected, classification seniority shall be considered a factor in work assignments for patrol officers within a uniform district squad. Seniority shall not be a consideration when training is a factor in work assignments.

After orientation, Plaintiff entered the Academy on February 22, 1988. The Academy lasted sixteen (16) weeks until May 27, 1988. At that time in 1988, Academy graduates were randomly assigned by the Personnel Bureau to the patrol division field training squads. Such assignments also would depend on the number of available training officers. Training squads consist of a sergeant, a corporal, and officers who had specific course training in functioning as a field training officer and this training is over and above regular patrol officer training (R1-41-VIII-L; R4-71-180-182).

Defendant's field training program in 1988 consisted of four phases for a total of 16 weeks.[1] The first phase consisted of a two-week orientation period within which the recruit would not be graded and was to merely ride with a field training officer to acquaint the recruit with certain types of calls and the area of patrol. The next portion of the training consisted of a four week training period within which the recruit would be graded by his or her field training officer. During this initial six week period, the recruit was assigned to his initial training squad, and in the case of Plaintiff, the first six weeks would have been spent on Sergeant Cook's squad. The next two training phases consist of two four-week periods during which the recruit is assigned to a "sister" training squad and to a different field training officer. There is value to the change in training officers during this "swap" as it allows the recruit an advantage of seeing different methods of supervision and different methods of training from different officers. Also, it allows the officer to patrol different areas of the City. During the final two week phase of the program, the recruit returns to his original squad and his original field training officer to complete his evaluation and field training (R1-41-VIII-M; DX 9; R4-71-107-108, 180-183, 206, 237-239).

Since the inception of the field training program in which Plaintiff initially participated, a recruit fresh out of the Academy

---

[1] Occasionally, in an "unusual" situation, training would be extended for those individuals who did not successfully complete the training within 16 weeks.

had never been placed on anything other than a field training squad (R4-71-207). The only exception to this occurred on a single occasion when there were a surplus of recruits and during the initial two-week orientation phase, the recruits were temporarily assigned to ride in patrol vehicles with police officers who were not field training officers. The recruits, however, still were required to be graded by field training officers (R4-71-239-241).

When Plaintiff was given his initial training assignment, other than for "downtown squads" (which were not training squads (R4-71-205-208)), all of Defendant's patrol squads, including the training squads, were on a four (4) 10-hour days on/three (3) day off rotating shift system. In 1988, the days off for such squads rotated forward one day every 56 days (R1-41-VIII-N; R4-71-106, 184).

Plaintiff's initial assignment was to Sergeant Cook's squad. Plaintiff's days off were Tuesdays, Wednesdays and Thursdays. Plaintiff did not have his Sabbath off from work (R1-41-VIII-S; R4-71-59).

During his first week of work, Plaintiff met with Sergeant Cook to request the upcoming Saturday off so that he could observe his Sabbath. Sergeant Cook referred Plaintiff's request to Major Pegram. Major Pegram in turn met with Colonel Fox. On June 17, 1988, Major Pegram granted Plaintiff his request for Saturday, June 18, as absent without pay (R4-71-60, 213-214). Major Pegram informed Plaintiff that he would accommodate Plaintiff for this request only. Plaintiff was told that, in the future, no further accommodations could be made (R4-71-108, 187, 214).

The following week, Plaintiff tried to get the following Saturday off from work to observe his Sabbath. Plaintiff again met with Major Pegram (R4-71-61, 214). A series of meetings by Plaintiff with Defendant's command staff then followed, including meetings by Plaintiff with Captain Walker, Colonel George Fox, Colonel Curtis Lane and Chief A.C. McLane. Chief McLane stated to Plaintiff to the effect that the Police Department could not make any special arrangement for Plaintiff's Sabbath (R4-71-61-63).

Approximately one day later, either Wednesday or Thursday, June 22 or 23, 1988, Plaintiff met with Major Pegram to inform him that he wished to resign from the Police Department (R4-71-67, 68, 215).

As found by both lower courts, Beadle's request for a permanent day off during his field training in June 1988 would be detrimental to the consistency of his training (R4-71-238-39). Specifically, as testified by former Colonel Fox, the objective of the field training program is to expose the officer to just about every situation that the officer may encounter as a uniformed officer (R4-71-182). That is the reason why officers rotate among different field training officers. It gives the officers the chance to see the techniques used by different officers as well as being exposed to different parts of the City, where problems can differ from neighborhood to neighborhood (R4-71-238). The consistency of the training program is absolutely necessary (Id.). It is extremely important to the continuity of the training program that the police officers be trained under different training officers (R4-71-182, 238-240). For Plaintiff to be assigned a particular field training officer during his

entire training would be detrimental to the program (Id.). If the Defendant did not properly train its police officers, the City could be subjected to great liability (R4-71-239). Accordingly, to accommodate Plaintiff's religious beliefs would have created an undue hardship and burden on the City of Tampa (R4-71-191-210). This probably explains why Beadle conceded that he knew of no accommodation available to him (R4-71-141-142).

Finally, during the trial of the companion case to this action, Beadle v. Hillsborough County Sheriff's Office, et al.,[2] two expert witnesses testified: Richard Kiekbusch for the Defendant, and Douglas Bennett for the Plaintiff.[3] Both expert witnesses concurred that in law enforcement, safety is the most important issue. Both also concurred that you should not compromise safety, and by permitting of a permanent day off, this could affect employee morale which, in turn, affects the safety of a law enforcement operation. Mr. Bennett also testified that while he would accommodate the religious desires of a Seventh Day Adventist, like Mr. Beadle, who wanted Saturdays off to observe his faith, he would not accommodate Methodists, Baptists and Catholics because they would want Sunday off. In his words:

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[2] A Petition for Writ of Certiorari in the Sheriff's case is also pending before this Court. See Beadle v. Hillsborough County Sheriff's Office, Case No. 94-1610.

[3] By agreement of counsel, the testimony of these two witnesses were applicable to both actions.

> The way its worked out over the years in the state of Tennessee, applicants regularly ask that question. They are regularly told 'No, we do not make accommodations to let people off on Sundays.' (R-3-103-04).

B. The Trial Court's Decision

In his Findings of Fact, the Magistrate Judge found, among other things, "At the trial, the City command officers testified that assignments to a particular training squad without rotation is detrimental to the consistency of the training and results in lack of proper training. According to the City, it is extremely important to the continuity of the training that the officers be trained under different field training officers."

Additionally, the Magistrate also found, "According to the City, the value of the change during this 'swap' [referring to the rotation of field training officers during the initial 16 week training phase] is to allow the recruit to see different methods of supervision and different methods of training from different officers. The City also contends that this method of training allows the officer to patrol different areas of the City."

Based partly upon these findings of fact, the Magistrate Judge concluded, "[r]equiring the department to grant shift exceptions to Beadle would be to incur a greater than **de minimis** cost because of the public health, safety and welfare considerations associated with police work. Title VII does not require the employer to assure the individual the opportunity to observe religious practices at all costs. See Ansonia

Bd. of Educ. v. Philbrook, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed. 2d 305 (1986)."

C. The Court of Appeals Decision

The Eleventh Circuit Court of Appeals affirmed the decision of the Magistrate Judge in favor of the City of Tampa.

In addressing the issue of undue hardship, the Eleventh Circuit found, "[t]he Department assigned recruits to several different training officers during the course of their training so that the recruits could experience varying methods of supervision and observe other patrol areas in the City." 42 F.3d at 634. The Eleventh Circuit went on to note "In order to accommodate Beadle's religious practices, the Department would have been forced to assign him to another training squad and not to reassigning him during the third phase of training. Beadle admits that he would not have experienced the educational benefits of working with different training officers . . .." 42 F.3d at 637. The Eleventh Circuit then concluded as follows: "We agree with the magistrate court's refusal to interfere with the Department's scheduling and training programs. When the employer's business involves the protection of lives and property, 'courts should go slowing restructuring [its] employment practices.' Albuquerque, 545 F.2d at 114. We conclude that the magistrate court did not err when it found that requiring the Department to grant shift exceptions would result in a greater than de minimis cost and that the city had met its obligation under Title VII." 42 F.3d at 636-37.

REASONS FOR DENYING THE WRIT

The gravamen of Plaintiff Beadle's argument is that this Court should overturn eighteen years of precedents established by this Court in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), and hold that undue hardship means substantial economic burden or significant burdens on the employer rather than what this Court held in Hardison that "undue hardship" is any cost to the employer that is more than de minimis. Trans World Airlines, Inc. v. Hardison, 432 U.S. at 84. Beadle's argument is not supported by a single post-Hardison decision.

Alternately, Beadle claims that this Court should accept certiorari and hold that unless the employer suffers "costs" in terms of monetary costs, then no matter what other economic burden the employer may suffer in accommodating the employee, it is by Plaintiff Beadle's definition not an "undue hardship." The absurdity of this position is best illustrated in this particular case. Specifically, the evidence in this case shows that unless Beadle completed the field training program as it existed at the time, he would not enjoy the full benefits of the program by having the opportunity of working with different field training officers, on different shifts, and in different locations of the City. Therefore, he would potentially put his and other officers' lives at risk because of his inadequate training. While arguably the monetary "cost" of training Beadle by assuring him Saturdays off would not have cost the City of Tampa any additional money, it would have cost the City of Tampa something much more important: human lives. Every municipality should put more importance on the lives of its police officers

than dollars and cents. Accordingly, to suggest that the City of Tampa did not incur undue hardship because it does not monetarily cost the City any additional money to accommodate Beadle, but instead it puts police officers lives at risk, simply makes no sense and one which this Court has never adopted.

Plaintiff's final position is that the lower court allegedly created an exception from Title VII's religious accommodation requirements for municipal law enforcement agencies. As will be explained below, neither the Defendant nor the lower courts have taken the position suggested by Beadle. However, as agreed by all parties, the determination of what constitutes reasonable accommodation should be based on a case-by-case basis. Moreover, as numerous cases have held, when the nature of the employer's business is in the protection of the health, safety and welfare of the community, this factor should be considered in determining what constitutes reasonable accommodation and undue hardship.

In summary, neither lower courts committed error in their determination in favor of the Defendant. Moreover, there is no reason why this Court should rewrite 18 years of precedent and hold that undue hardship means substantial burden on the employer. Accordingly, this Court should not exercise its discretionary jurisdiction and grant Plaintiff Beadle's Petition for Writ of Certiorari.

LEGAL ARGUMENT

A. THE ALLOCATION OF THE PARTIES' RESPECTIVE BURDENS IN A TITLE VII RELIGIOUS DISCRIMINATION CASE[4]

In religious discrimination cases brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §§ 2000e - 2000e-17, a plaintiff has the initial prima facie burden of proving "'he had a bona fide religious belief that conflicted with an employment requirement, that he informed his employer of this belief and that he was discharged for failing to comply with the conflicting employment requirement.'" Mathewson v. Fla. Game & Fresh Water Fish Comm'n, 693 F. Supp. 1044, 1050 (M.D. Fla. 1988), aff'd, 871 F.2d 123 (11th Cir. 1989), citing Brener v. Diagnostic Center Hospital, 671 F.2d 141, 144 (5th Cir. 1982).

Once a plaintiff has carried his initial prima facie burden, the burden shifts to the defendant to show either (1) that it offered the plaintiff a reasonable accommodation of his religious practices, or (2) that any accommodation of the plaintiff's practices would result in undue hardship to the employer. Mathewson, 693 F. Supp. at 1050. As to defendant's first alternative production, a reasonable accommodation, the defendant is not required, as suggested by Beadle, to give

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[4] At trial and on appeal, the City argued that the lower courts should never even get to the merits of the case because Beadle knowingly and voluntarily waived his Title VII rights when he signed a release. Both lower courts disagreed. That issue is not before the Court.

plaintiff a choice among several accommodations; nor is defendant required to demonstrate that alternative accommodations proposed by plaintiff entail undue hardship. Mathewson, 693 F. Supp. at 1050, citing, Ansonia Board of Education v. Philbrook, 107 S.Ct. 367 (1986). Moreover, defendant is not required to accommodate the religious practices of plaintiff in exactly the way the plaintiff would like to be accommodated. Pinsker v. Joint Dist. No. 28J, 735 F.2d 388 (10th Cir. 1984). Nor does Title VII require defendant to accommodate plaintiff's religious practices in a way that spares plaintiff any cost whatsoever. Brener, 671 F.2d at 141, 145-46.

As stated above, in determining the degree of reasonable accommodation required, the courts have traditionally looked to the nature of defendant's business. When the defendant's business concerns the protection of the public's health, safety or welfare, the courts have held that very little is required of the defendant to make a reasonable accommodation. See, e.g., Blair v. Graham Correctional Center, 782 F. Supp. 411 (C.D. Ill. 1992), aff'd, 4 F.3d 996 (7th Cir. 1993), cert. denied, 1993 WL 501913 (1994)(corrections officer); Ryan v. U.S. Dep't of Justice, 950 F.2d 458 (7th Cir. 1991), cert. denied, 112 S. Ct. 2309 (1992)(FBI agent); United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976), cert. denied, 433 U.S. 909 (1977)(firefighter); Murphy v. Edge Memorial Hospital, 550 F. Supp. 1185 (M.D. Ala. 1982)(pharmacists); and Miller v. Drennon, 56 Fair Empl. Prac. Cas. (BNA) 274 (D. S.C. 1991), aff'd, 966 F.2d 1443 (4th Cir. 1992)(paramedic). This balancing of interests was best summarized by the Tenth Circuit in United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1977),

cert. denied, 433 U.S. 909 (1976), when the court stated:

> In our view when the "business" of an employer is protecting the lives and property of a dependent citizenry, courts should go slow in restructuring his employment practices (citation omitted).

Id. at 114.

Only if the defendant is unable to put forth any evidence of a reasonable accommodation, does the employer need to put forth evidence of an undue hardship. See, e.g., Mathewson, 693 F. Supp. at 1050; Mann v. Frank, 795 F. Supp. 1438 (W.D. Mo. 1992), and Brown v. Keebler Co., 62 Fair Empl. Prac. Cas. (BNA) 1170 (N.D. Geo. 1993), aff'd, 37 F.3d 637 (11th Cir. 1994). This is because "[o]nce the employer [Defendant] has demonstrated that it has offered a reasonable accommodation to the employee [Plaintiff], the statutory inquiry ends." Cook, 779 F. Supp. at 1016, 1022, citing Ansonia, supra. If defendant fails to put forth any evidence of a reasonable accommodation, then defendant must put forth evidence of an undue hardship by either showing (1) the accommodation compromises the employment entitlement of other employees, or (2) the cost of the accommodation is more than de minimis. Murphy, supra, citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 75 (1977). If defendant proves either a reasonable accommodation or an undue hardship, judgment must be entered in its favor. Since the Eleventh Circuit focused on the Magistrate Judge's finding of undue hardship, Defendant

will address the correctness of that portion of the decision.[5]

B. BOTH LOWER COURTS CORRECTLY HELD THAT TO FURTHER ACCOMMODATE PLAINTIFF'S RELIGIOUS BELIEFS WOULD HAVE CREATED MORE THAN A DE MINIMIS COST TO THE DEFENDANT

Plaintiff asserted at trial and on appeal that the Defendant could have accommodated him by transferring him to Sergeant Dawson's training squad. After this transfer, Plaintiff suggests he should not have rotated off Sergeant Dawson's training, but remained with him throughout his training. Plaintiff then suggest that after completion of his training, he should have been assigned the downtown squad which did not work on Saturday and Sundays. As the evidence showed, and the lower courts correctly found, this recommended accommodation would have created more than a de minimis cost to the Defendant. Specifically, the Magistrate Judge found, "However, the Court concludes that requiring the Department to grant shift

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[5] Defendant contends that the Magistrate Judge was correct when he ruled that the Defendant met its duty of reasonable accommodation when it offered its neutral shift rotating system. Since the Eleventh Circuit's opinion did not focus on this issue, neither will this brief. However, in support of its position that its neutral rotating shift system was a reasonable accommodation to Plaintiff Beadle, Defendant incorporates its argument put forth in its Brief in Opposition to Beadle's Petition for Writ of Certiorari in Beadle v. Hillsborough County Sheriff's Office, et al., No. 94-1610 (pp.14-18)(the companion case) currently pending before this Court.

exceptions to Beadle would be to incur greater than a de minimis cost because of the public health, safety and welfare considerations associated with police work" (R2-78-21).

As stated above, in determining what is a reasonable accommodation, and by analogy, what constitutes a de minimis costs, courts have employed a balancing of interest test between the religious beliefs of the employee and the nature of defendant's business. (See further discussion in Section C, infra.) Since Defendant is in the business of protecting the health, safety and welfare of its citizens, very little hardship is required before a de minimis cost is found on the defendant. See City of Albuquerque, supra; Blair, supra; Ryan, supra; Murphy, supra; Brener, supra; and Miller, supra. As noted in Beadle's Petition and as the court in Yott v. North American Rockwell Corp., 602 F.2d 904, 909 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980) held, "Further, a standard less difficult to satisfy than the 'de minimis' standard for demonstrating undue hardship expressed in Hardison is difficult to imagine."

Courts have held in a variety of circumstances that having to guarantee an employee off for his Sabbath creates an undue hardship. For example, in Hardison, supra, the court held that allowing an employee off on his Sabbath is an undue hardship because of the loss of efficiency it creates in the other jobs. Likewise, in EEOC v. Heil-Quaker Corp., 55 Fair Empl. Prac. Cas. (BNA) 1895 (M.D. Tenn. 1990), the court held that undue hardship may also consist of increased safety hazards, corresponding increased risk of liability, increased cost of workers' compensation and decreased employee morale. In Ackerman v. Amtrak, 772 F. Supp. 579 (S.D. Fla. 1990), the

court held that undue hardship could consist of possible loss of efficiency that may result from being understaffed and the friction it creates with other co-employees. Finally, in Cook v. Chrysler Corp., 779 F. Supp. 1016 (E.D. Mo. 1991), aff'd, 981 F.2d 336 (8th Cir. 1992), cert. denied, 113 S. Ct. 2953 (1993) the court held that undue hardship could be shown by proving the hard feelings and animosity that may be created by allowing the employee to transfer or swap days off.

All of the above reasons (loss of efficiency, increased safety risk, increased liability and decrease in employee morale) were found to exist in this case. These hardships were testified to by Defendant's witnesses and both experts. Accordingly, the accommodations suggested by the Plaintiff amounted to more than a de minimis cost to the Defendant. Therefore, their is no reason to disturb the findings of the lower courts.

Beadle realizes the difficulty of this Court to accept certiorari because of both lower courts' determination that to further accommodate his religious beliefs, the City would have incurred more than a de minimis cost. Accordingly, Plaintiff has tried to cleverly argue that both lower courts found only a "burden" of accommodating the Plaintiff and not a "cost." This argument lacks merit for two reasons. First and foremost, the lower courts both found that to further accommodate Plaintiff Beadle would have resulted in more than a de minimis cost. Additionally, Plaintiff's argument that burden is not the same as costs as that term has been used by this Court and lower courts is without merit.

In analyzing Plaintiff's argument, the appropriate starting point is clearly Trans World Airlines, Inc. v. Hardison, supra. In discussing the issue of undue hardship, this Court first stated:

> The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages.

432 U.S. at 84-85. The Hardison court then went on to hold:

> Both of these alternatives would involve cost to TWA either in the form of lost efficiency in other jobs or higher wages.

432 U.S. at 84 (emphasis supplied). Moreover, the Court went on to state:

> The dissent argues that 'the cost to TWA either paying overtime or not replacing respondent would [not] have been more than de minimis. Post, at

> 2281 n.6. This ignores, however, the express finding of the District Court that '[b]oth of these solutions would have created an undue burden on the conduct of TWA's business.'

432 U.S. at 84 n.15 (emphasis supplied). Moreover, the Eleventh Circuit correctly noted in its opinion, "The Court [referring to the Court in Hardison] has also recognized that the phrase 'de minimis cost' entails not only monetary concerns, but also the employer's burden in conducting its business." 42 F.3d at 636.

Hardison and its progeny have held that undue hardship can be defined in terms of both economic costs to the employer and the burden on the employer such as loss of efficiency, increased risk, decreased employee morale. To suggest as Plaintiff Beadle has that the City would incur undue hardship only if it had to pay overtime, but not if the City has one less patrol officer on the street, thereby endangering lives, makes no logical sense and has no legal support.

C. BOTH LOWER COURTS CORRECTLY CONSIDERED THE NATURE OF DEFENDANT'S BUSINESS WHEN DETERMINING WHETHER BEADLE'S REQUESTED ACCOMMODATION AMOUNTED TO MORE THAN A DE MINIMIS COST TO THE DEFENDANT

As the Magistrate Judge correctly found and as affirmed by the Eleventh Circuit, "Each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer acted reasonably." (R-78-18), citing, United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1977), cert. denied, 433

U.S. 909 (1976). Because the courts utilize a case-by-case analysis, it follows that an employer's duty to accommodate varies from case to case.

Other than City of Albuquerque, there are few Title VII religious accommodation cases involving public employers in a public safety, law enforcement or correctional function. In Blair v. Graham Correctional Center, 782 F. Supp. 411 (C.D. Ill. 1992), aff'd, 4 F.3d 996 (7th Cir. 1993), cert. denied, 1993 WL 501913 (1994), the court considered a Seventh Day Adventist correctional officer's claim of religious discrimination against the Illinois Department of Corrections. Much like the Tenth Circuit in City of Albuquerque, in analyzing reasonable accommodation under Title VII, the Blair court reasoned, "[i]n a paramilitary organization, it is even more difficult to accommodate employees who are restricted as to their assignments in view of the fact that the demands may overwhelm the organization." 782 F. Supp. at 414. The court applied this standard to a correctional facility:

> The personnel structure of Graham Correctional Center is analogous to a paramilitary organization. This Court notes the importance to the public interest in having a full staff of corrections officers on duty every hour of every day of the week, including sabbaths and religious holidays and in an institution such as Graham Correctional Center. Obviously, most everyone prefers not to work weekends and holidays. . . . If Defendants were required to amend the union agreement in order to accommodate all employees, religious

> practices, they would run the risk of having the correctional institutions undermanned, thereby endangering other employees and society.

782 F. Supp. at 414.

Similarly, the court considered the mission of the defendant employer, the FBI, in Ryan v. U.S. Dept. of Justice, 950 F.2d 458 (7th Cir. 1991). In Ryan, an FBI agent refused a case assignment based on a personal religious belief which prevented him from investigating anti-military activity. In upholding the employer's discharge, the Seventh Circuit commented:

> Sympathy for a dedicated agent trapped between his career and his faith comes easily . . . It is difficult for any organization to accommodate employees who are choosy about assignments. For a paramilitary organization, the tension is even greater. . . . With good will all around, and flexibility on the part of Ryan's fellow agents, it just might be possible to make a go of it. Title VII does not, however, compel the FBI to attempt this . . . Compelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it.

Id. at 462.

Likewise in Murphy, a case involving licensed practical nurses and Miller, a case

involving EMS paramedics, the courts found that the employer did not discriminate against the employee on the basis of their religion. Both courts noted the importance of the particular public safety functions that the employer was performing.

Surely, no one can argue that the job functions of a police officer are any less important to the public's health, safety and welfare than FBI agents, firefighters, LPNs or EMSs. In short, Defendant has not been able to locate a single decision where an employer was found to have discriminated against an employee on the basis of their religion where the employer is engaged in the protection of the health, safety and welfare of the general public. As the Magistrate Judge noted and the Eleventh Circuit concurred:

> Although the cases reflect the view that the trial court must evaluate reasonable accommodation and undue hardship in light of the employment context of each case, the Court is unable to find any authority which would require a public health or safety agency to grant such an employee an exception from the customary neutral rotating shift system used by law enforcement agencies in order to accommodate the Sabbath requirements of the officer (R2-78-20).

Plaintiff Beadle states in his Petition "The Court did not rely on any evidence of adverse public health, safety or welfare consequences, but simply made a per se determination that law enforcement positions are exempt from Title VII accommodation

requirements" (Pet. Writ Cert., p.23). There is no where in either of the lower courts' decisions that specifically hold that law enforcement departments, as a matter of law, are exempt from Title VII accommodation requirements. Moreover, both lower court decisions cited to numerous record evidence about the undue hardship associated with accommodating Plaintiff's religious beliefs. Plaintiff's argument is, therefore, without merit.

D. PLAINTIFF'S ARGUMENT THAT HE SHOULD HAVE BEEN TEMPORARILY ACCOMMODATED UNTIL A PERMANENT ACCOMMODATION COULD BE WORKED OUT IS WITHOUT MERIT

During trial and on appeal, Plaintiff suggested that he should have been allowed to transfer to Sergeant Dawson's squad instead of Sergeant Cook's squad so his days off would have initially been Thursday, Friday and Saturday during the first fifty-day cycle. Plaintiff then argues that he should have been further accommodated by not transferring off Sergeant Dawson's training squad so that he could have continued to have Thursday, Friday and Saturdays off during his entire training period. Plaintiff then suggests that after the completion of the training he should have been given one of the more favorable assignments that typically did not work weekends. As was discussed above, and as found by both lower courts such accommodations would have been detrimental to the continuity and consistency of the training program, therefore, the cost of this accommodation was more than de minimis. Moreover, such temporary accommodations would not have solved the problem at hand and the City was not required to temporarily accommodate him.

Plaintiff's argument that he should have been temporarily accommodated until he completed his field training is too speculative for the Court. Specifically, in Meadows v. Golden Grain Macaroni Co., 45 Fair Empl. Prac. Cas. (BNA) 235, 244 (N.D. Ill. 1987), the court in a religious discrimination suit, stated:

> But even if the court were to conclude that Golden Grain should have granted Meadows a temporary shift exchange of sixty or ninety days, there is no evidence that ultimately, Meadows' discharge could have been avoided. It is clear that on July 30, 1984, slightly less than one year after Meadows' discharge, Fred Militech, an employee with less seniority than Meadows was able to bid successfully on a first shift janitor job, but the court would be engaging in sheer speculation were it to try to divine whether, had Meadows been granted a temporary shift change, an acceptable position would have become vacant before the company required him to return to his assigned shift. This court does not believe it can grant relief on such speculative basis (emphasis added).

Id. at 244.

In this case, the lower courts would have been engaging in pure speculation to assume that if Plaintiff had completed his training, he would have been given an assignment that did not require him to work his Sabbath. Thus, the lower courts correctly refused to engage in speculation by assuming that if the Plaintiff

had completed his training, he would have been given such an assignment.

E. TO HAVE A HIGHER THRESHOLD FOR UNDUE HARDSHIP THAN "DE MINIMIS," THE COURT WOULD BE INFRINGING ON THE ESTABLISHMENT CLAUSE TO THE UNITED STATES CONSTITUTION

In his Petition, Plaintiff Beadle makes several references to the Establishment Clause in the United States Constitution in regard to the Court's determination of what constitutes undue hardship. Plaintiff relies upon Professor Michael McConnell in support of his position that the Supreme Court misinterpreted the Establishment Clause in its implicit ruling in the Hardison decision. Defendant believes that when this Court ruled on what constituted undue hardship in its Hardison opinion, it was clearly aware of the Establishment Clause and, therefore, its holding is consistent with the requirements of Title VII.

Defendant does agree with Plaintiff that this Court should be mindful of the Establishment Clause. As Plaintiff's own expert testified, he would give special preference to the Seventh Day Adventist over the desires of Methodists, Baptists, Catholics, and the like. The City of Tampa, as a municipal corporation, would be dangerously close to violating the Establishment Clause if it recognized the religious beliefs of the Seventh Day Adventist by accommodating their beliefs, but refuses to do so for the Methodists, Baptists, Catholics and the like.

Defendant does not deny that the courts have recognized that there is a tension between the duty of religious accommodation under Title VII and the Establishment Clause. Few courts

have discussed the precise issue of whether a public employer, such as Defendant, which accommodates a plaintiff by granting a permanent day off thereby violates the Establishment Clause to the rights of other public employees of Defendant.[6]

Defendant relies upon language contained in the concurring opinion of Justice O'Connor in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). In Caldor, the Supreme Court struck down as unconstitutional under the Establishment Clause a Connecticut state statute which prohibited Connecticut employers from disciplining employees for refusing to work on their Sabbath. In her concurring opinion, Justice O'Connor clarified her position that the majority's holding in Caldor should not be read to invalidate Title VII's religious accommodation provisions. Justice O'Connor explained, "[l]ike the Connecticut Sabbath law, Title VII attempts to lift a burden on religious practice that is imposed by private employers and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause. Id. at 712 (O'Connor, J. concurring)(emphasis in original). In her concurring opinion, Justice O'Connor also notes, "The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar benefits to the ethical and religious beliefs and practices of other private employees." 472 U.S. at 709 (emphasis supplied). Furthermore, Justice O'Connor states, "These provisions preclude employment discrimination based on a person's

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[6] As discussed, infra, the court in Miller, supra, has at least discussed this issue.

religion and require private employees to reasonably accommodate the religious practices of employees unless to do so would cause undue hardship to the employer's business." 472 U.S. at 713 (emphasis supplied).Defendant suggests that Justice O'Connor's emphasis on "private" employers calls into question whether Title VII's religious accommodation requirements entirely reach public employment. In other words, it is one thing for a private employer to be required to give an accommodation to its employees, but it is entirely another matter for a public employer to grant a public employee a permanent religious holiday vis-a-vis his fellow employees.

At least one court follows a similar interpretation of Caldor. In Miller, supra, the court found that giving a public employee plaintiff the accommodation he requested constitutes a violation of the Establishment Clause. Specifically, in Miller, as discussed above, the plaintiff was an EMS paramedic who had a religious-based reservation against being assigned to a shift where he would be stationed alone with a female co-worker. Plaintiff claimed religious discrimination under Title VII and also sued under 42 U.S.C. § 1983 ("§ 1983") claiming that his public employer's failure to accommodate his belief was a violation of the free exercise clause of the constitution. In rejecting plaintiff's claims, the court explained:

> Here, it is undisputed that the rotating schedule was implemented by the County in furtherance of its legitimate needs. The County had a legitimate interest in reducing its overtime costs and more evenly distributing the workload among its

> EMS personnel. The incidental effect of the rotating schedule policy may have been to interfere with plaintiff's religious beliefs and practices, but that is not sufficient to implicate the Free Exercise Clause, much less to constitute a violation thereof.

Miller, 56 Fair Empl. Prac. Cas. at 280. The plaintiff also asserted under the Free Exercise Clause that the defendant County would have to meet the familiar constitutional standard of showing a compelling governmental interest and taking the least restrictive alternative. The court disagreed and reasoned:

> Moreover, plaintiff cannot prevail under the 'compelling state interests--least restrictive alternative' analysis he advocates. To permit plaintiff to be exempt from assignment at certain locations or to exempt him from assignments with a female partner solely because of his religious beliefs would single out his religious beliefs for preferable treatment. Such action would, when undertaken by Lexington County, constitute a violation of the Establishment Clause. See Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)(law requiring employers to permit employees not to work on Sabbath violates Establishment Clause). Avoiding a violation of the Establishment Clause, is by definition, a compelling state interest (emphasis supplied).

Miller, 56 Fair Empl. Prac. Cas. at 280, citing, Caldor, 472 U.S. 703. Reading Caldor and Miller together, from Justice O'Connor's emphasis on the term "private" employers and the court in Miller emphasizes that a preferential shift assignment "undertaken by Lexington County," a public employer, would be unconstitutional, demonstrates that there is a distinction to be drawn between public and private employers in terms of determining whether an accommodation by a public employer consisting of a permanent shift assignment constitutes a violation of the Establishment Clause. As Defendant argues above, not only is Defendant not required by Title VII to accommodate Plaintiff by giving him preferential treatment including a permanent shift assignment or a specific training schedule, were Defendant to do so, it would be in violation of the Establishment Clause of the United States Constitution under the reasoning in Caldor and Miller.

CONCLUSION

Plaintiff has made the same legal arguments to the Magistrate Judge and the Eleventh Circuit as he does to this Court. Both lower courts have properly disagreed with his interpretation of the law. Both lower courts have correctly applied United States Supreme Court and Eleventh Circuit precedents in ruling that the City of Tampa did not discriminate against him. Accordingly, there has been no error committed by either of the lower courts and there is no reason why this Court should grant Plaintiff's Petition for Writ of Certiorari.

Dated this 17th day of May, 1995.

Respectfully submitted,

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MOTION FILED
MAY 19 1995

No. 94- 1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASHTON A. BEADLE,

Petitioner,

—v.—

CITY OF TAMPA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR CERTIORARI

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1995

No. 94-1075

In The Supreme Court of the United States

October Term, 1994

ASHTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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1. The American Jewish Congress and the Christian Legal Society respectfully seek leave to file the attached brief *amici curiae* in support of Petitioners.

2. The Petitioners consented to the filing of this brief; Respondents did not.

3. Both *amici* routinely represent individuals complaining of religious discrimination in employment. The outcome of this case is thus important to their ongoing work.

4. For these reasons, the two organizations respectfully request permission to file the attached brief.

Marc D. Stern

May 18, 1995

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INTEREST OF THE *AMICI*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has taken a particular interest in the religious liberty provisions of Title VII, believing that religious accommodation must be given a broad and generous reading in order to protect religious believers.

* * *

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has adovcated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations shince 1980.

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious freedom.

ARGUMENT

Title VII requires that employee religious practice be accommodated unless doing so imposes an "undue hardship", 42 U.S.C. § 2000e(j). In *T.W.A, Inc. v. Hardison*, 432 U.S. 63 (1977), this Court construed undue hardship as anything more than a *de minimis* hardship. This case presents the question of whether even that burden is satisfied by an employer who does absolutely nothing to accommodate the employee, 42 F.3d at 637, despite the availability of an alternative which was not shown to impose any costs on the employer, much less an undue burden. As a subsidiary question, it presents the question of whether accommodation in "public safety positions" imposes "undue hardship" as a matter of law without regard to whether in fact the accommodation results in any measurable loss of efficiency in the provision of these services.

One would have thought that the answer to both of these questions is no. Surely, the uninformed person reading the statute would think so, as would the reader of judicial decisions from around the country. But in the Eleventh Circuit, the answer is different. There, the answer to both questions is yes. This Court should grant a writ of certiorari to restore unity to the caselaw and meaning to the statute.

I. No Burden Is Not An "Undue Hardship"

Petitioner Beadle graduated from Tampa's police academy and was assigned to its follow-up training program. The schedule for trainees was the same as for the Department generally–the so-called "neutral rotating shift." 42 F.3d at 635. The shift's neutrality lies exclusively in the fact that it is equally indifferent to all employees' religious practices. Tampa, indeed, is ruthless in its neutrality. It does not allow employees to 'swap' shifts with fellow employees in order to ameliorate the harsh effects of its neutral policy or to depart in any other way from its established shifts. 42 F.3d at 637.

The Eleventh Circuit found that this scheme discharged Tampa's duty to accommodate, citing *Hardison*, 432 U.S. at 80-81. Since, as Judge Posner has put it (albeit in the context of the Americans With Disabilities Act), the duty to accommodate means that the "employer must be willing to consider changes in its ordinary work rules . . . ." *Van de Zande v. Wisconsin*, 44 F.3d 538, 542 (7th Cir. 1995), this result cannot be based on the rule of *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60 (1986), that any accommodation which removes the conflict between faith and productive employment satisfies the statutory duty. Nothing Tampa has done remotely approaches meeting this standard. The Court below implicitly acknowledged this and accordingly rested on a finding that accommodating Beadle would produce undue hardship. 42 F.3d at 637.

The Court of Appeals began its discussion of undue hardship by quoting a passage of *Hardison* suggesting that by allowing a mandatory preferential escape from a seniority system for employees with religious needs, an employer would create problems of morale and fairness for its work force. In its original context this paragraph addresses the definition of what is an accommodation, not the undue burden question the Eleventh Circuit said it was addressing.

The Eleventh Circuit must, then, have read this passage to mean that any departure from a neutral rotating shift always creates undue hardship as a matter of law. The vice in the argument is that it would mean that every employer would establish an inflexible "neutral rotating schedule" and claim undue hardship in order to avoid accommodating employee religious practices.

This reading necessarily eviscerates a statute whose enforcement has lead to gainful employment for millions of Americans who observe religious calendars different than the prevailing norm. And it assumes that American workers are uniformly hostile and unsympathetic to the religious needs of their co-workers. In fact, the practical experience of the organizations signing this brief–as well as the case law–indicates otherwise.

In *Hardison*, moreover, the employer did not insist on its schedule and no other, as Tampa does. T.W.A. was prepared to accept whatever swaps Hardison and the union would agree to. Tampa is not so flexible. Its police must eschew any and all time-bound religious prohibitions

on gainful employment. Its trainees must be trained only as Tampa arbitrarily dictates, and no other way.

The Eleventh Circuit's misapprehension of *Hardison* suggests that without any proof that swaps or other scheduling changes would constitute undue (or any) hardship,[1] a rotating neutral shift satisfies the statute. As we have shown, *Hardison* itself held no such thing. Any fair reading of the case demonstrates that the availability of swaps and proof that Hardison's proffered accommodation was untenable was essential to its holding. Invoking that decision after undermining its foundations is not an acceptable application of *stare decises*.

The religious accommodation provision of Title VII means at least that religious practice has some weight in the balance, that its presence requires some individualized consideration, that employers cannot simply hide behind a veil of ostensible neutrality when confronted with an employee whose religion dictates a departure from the ordinary norms of the workplace. So much is apparent from the face of the statute.

The suggestion of the Court below (and of the Respondents) that departure from a system of absolute and unbending indifference constitutes undue hardship

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1. In the present posture of this case, it is not necessary to pass on a question which has divided the Courts of Appeal, namely whether the employer may delegate all responsibility for finding an accommodation to the employee, or whether the employer must aid in this search.

cannot be reconciled with the plain language and purpose of Title VII's religious accommodation provision.

The Eleventh Circuit's holding that departure from a neutral rotating shift is as a matter of law undue hardship would render Title VII's protections wholly nugatory in regard to the observance of religious holidays and the Sabbath. Although the legislative history of the religious accommodation provision is sparse, what there is demonstrates that it was introduced and adopted precisely to ameliorate such conflicts, and to lessen the financial pressures on Sabbatarians to abandon their faith as a price of holding gainful employment. 118 Cong. Rec. at 706 (1972) (remarks of Senator Randolph).

Under the Eleventh Circuit's construction, by contrast, 2000e(j) might retain vitality in other religious conflicts, say dress codes, but not in regard to scheduling clashes which give rise to the statute in the first place. Its construction of the statute therefore cannot stand.

II. There Is No Blanket Safety Exemption From the Duty to Accommodate

As an alternative ground for its holding, the appeals court effectively held that "public safety employers" are exempt from Title VII's duty to accommodate. 42 F.3d at 637. Beadle conceded that accommodating him would have meant that he would have not "experienced the educational benefits of working with differing training officers." *Id.* He argued however that this change would not have significantly affected his training. The Court

held it would not second guess Tampa's insistence on its training program.

In an attached footnote, and without further explanation, the Court brushed aside as "irrelevant" Beadle's evidence that those parts of the training that he missed were not crucial, as demonstrated by the fact that they were eliminated shortly after he passed through the program. Before addressing the broader holding with regard to public safety employees and religious accommodation, we address this evidentiary holding.

The Federal Rules of Evidence (R. 401) define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable . . . than it would be without the evidence."

Unless as a matter of law no policeman can ever invoke 2000e(j) with regard to scheduling conflicts, the validity of Tampa's undue hardship claim turned on whether Beadle would be a less competent police officer for not having two training officers. Surely, the trier of fact might reach a different conclusion on this question if he or she knew that shortly after Beadle passed through the system, this part of the training program was eliminated. Presumably, Tampa is not turning out less competent police under this new system than under its prior system. How, then, could it be irrelevant that Tampa no longer insists on the very training it insisted that Beadle take, and without which it says he could not function effectively as a police officer?

But even on its own terms, the Eleventh Circuit's treatment of this issue is no more satisfying. *In toto* that court held:

> We agree with the magistrate court's refusal to interfere with the Department's scheduling and training programs. When the employer's business involves the protection of lives and property, "courts would go slow in restructuring [its] employment practices." *Albuquerque*, 545 F.2d at 114.

This sort of judicial self-abnegation has not been applied in any other area of Title VII. Courts have reviewed–and invalidated– police examinations, promotional policies, height and weight requirements, and elements of training programs. They have likewise rejected other challenges to employment practices on the merits, not by adopting the Eleventh Circuit's blind and non-reflexive deference to inflexible procedures, but by applying ordinary Title VII standards of proof that these practices cannot be abandoned or modified without creating undue hardship.

Thus, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court invalidated height and weight requirements for correction guards, but upheld on peculiar facts proved by the state of Alabama–that its prisons were characterized by 'rampant violence' and a 'jungle atmosphere', *id.* at 334–an exclusion of women guards from certain prison jobs. Nowhere in the opinion is there any suggestion that

the judgments of prison officials are entitled to deference, a concept not unknown to this Court.

The lower federal courts have also passed on a wide variety of discrimination claims in hiring, firing, promoting and training public safety officers. In some of these cases plaintiffs prevailed and in others defendants did, but the courts apply standard Title VII principles without the formless, evidenceless deference practiced here by the Eleventh Circuit. See, *e.g.*, *Blanding v. Pennsylvania State Police*, 12 F.3d 1303 (3rd Cir. 1993) (police; discharge); *Sorenson v. City of Aurora*, 984 F.2d 349 (10th Cir. 1993) (fire department discharge); *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991) (fireman; discharge); *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985) (police; hiring criteria); *United States v. Commonwealth of Virginia*, 620 F.2d 1018 (4th Cir. 1980) (police; hiring criteria); *Guardians Assoc. v. Civil Svc. Comm'n*, 633 F.2d 232 (2d Cir. 1980) (same).

We do not suggest that the special nature of public safety employment in general or police work in particular is irrelevant in the adjudication of these cases. *Cf. Davis v. City of Dallas, supra*. Plainly it is relevant. We contend only that the Court below erred in allowing the bare fact that this case involves police employment to mechanically dictate the result.[2]

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2. The Tenth Circuit in *U.S. v. City of Albuquerque*, 545 F.2d 110 (10th Cir. 1976) did in fact write that courts should go slow in restricting the

(continued...)

Congress knows how to exempt public safety officers from civil rights and other labor laws. See 29 U.S.C. § 623(j) (age discrimination); 29 U.S.C. § 213(b)(20) (overtime pay). It did not do so with regard to religious accommodation. The Eleventh Circuit should not have created such an exemption by judicial fiat.

CONCLUSION

This Court has twice passed on the interpretation of Title VII's religious accommodation provisions. Each time this Court offered a narrow reading of those guarantees. We believe the decision below is incompatible with those narrow constructions of the Act. But there is a broader reason to review the judgement below. The Eleventh Circuit has apparently taken these narrow readings as a signal that these provisions are not to be applied with the

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2.(...continued)

practices of employees charged with protecting the life and property of citizens. The Eleventh Circuit erroneously thought that decision established a rule of law. The Tenth Circuit, however, did not treat this understandable caution as tantamount to a rule of law. That Court instead reviewed the detailed findings of the trial court finding that an accommodation of a Sabbatarian firefighter plaintiff was impossible. Those findings did not turn on any notion of deference

same rigor as the rest of Title VII. The Court should take this case to clarify its understanding of this important provision of the nation's civil rights laws.

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May 19, 1995

No. 94-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, a Florida municipal corporation, and THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND MEMORANDUM OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AND THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the National Jewish Commission on Law and Public Affairs ("COLPA") and the International Association of Jewish Lawyers and Jurists (American Section) ("IAJLJ") hereby

move for leave to file the attached Memorandum in support of Petitioner.

Petitioner has consented to the filing of this Memorandum. Respondents' counsel have stated that they "neither agree nor object to" the filing of this Memorandum.

Since the *amici* have previously filed briefs in this Court on religious liberty issues and wish to bring the considerations in this Memorandum to the attention of the Court, they hereby request leave to file.

Respectfully submitted,

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MEMORANDUM OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AND THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

In two companion cases involving the same petitioner, the Court of Appeals for the Eleventh Circuit has effectively excluded Sabbath-observing individuals from service as local government law-enforcement officials with

no substantial evidence that accommodation to the religious convictions of such prospective employees would create an undue hardship. The *amici* are Jewish organizations committed to the protection of rights to observe the Jewish faith in the United States and throughout the world. Although the Eleventh Circuit's decisions involve a member of the Seventh-Day Adventist Church, the principles stated by the court would apply to Orthodox Jews, to Sunday-observing Christians, and to observant Muslims. We urge this Court to correct the Eleventh Circuit's misapplication of the Civil Rights Act and thereby prevent the unwarranted exclusion of Sabbath-observers from government jobs which they are fully able to carry out.

Observance of the Sabbath is a central principle of the Jewish faith and has been a unifying force throughout 35 centuries of the existence of the Jewish people. Unreasoned discrimination in employment against Sabbath-observers by government agencies is contrary to the principles of freedom enshrined in the First and Fourteenth Amendments.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a non-profit association of volunteer attorneys and social scientists who donate their services for public advocacy on behalf of the Orthodox Jewish community. COLPA has filed briefs on the merits in most of the important religious liberty cases considered by the Court over the past twenty years. *See, e.g., Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Cmte. for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *TWA v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Corp. of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*,

483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993); *Board of Education of the Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994).

The national Orthodox Jewish organizations joining this brief through COLPA are:

Agudath Harabonim of the United States and Canada
Amit Women
Emunah of America
National Council of Young Israel
Poalei Agudath Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah (The National Society for Hebrew Day Schools)
Union of Orthodox Jewish Congregations of America ("Orthodox Union")

The International Association of Jewish Lawyers and Jurists (American Section) ("IAJLJ") is a membership organization consisting of attorneys and judges in more than 32 countries around the world. Its founder was retired Justice Haim Cohn of the Supreme Court of Israel, and its Honorary President, until his death, was former Justice Arthur J. Goldberg. The American Section was organized in 1983 by members of the American Jewish legal community to defend Jewish interests and human rights in the United States and abroad. Among the IAJLJ's concerns has been the protection of the right to observe one's religion, and particularly the protection of Jewish religious rights around the world.

ARGUMENT

Notwithstanding the statutory requirement of Section 701(j) of the Civil Rights Act of 1964, as amended, the Eleventh Circuit has held in this case that a police department need not make any change whatever in its "neutral rotating shift system" for an employee who has religious convictions that prevent him or her from working from sundown Friday to sundown Saturday. The court below said that since "the employer's business involves the protection of lives and property" (Pet. App. 10a) and it is required to allocate work schedules "among over nine hundred employees" (Pet. App. 9a), any departure from its system of random assignments would be more than the *de minimis* accommodation prescribed by *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The Eleventh Circuit rejected the position presented by the Equal Employment Opportunity Commission, which filed an *amicus curiae* brief in support of the petitioner.

The Eleventh Circuit's conclusion conflicts with the governing statute, with this Court's decisions applying that statute, and with decisions of other federal appellate courts. It also conflicts with the approach approved by a majority of this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), whereby religious minorities, such as the Seventh-Day Adventist Church to which the petitioner belongs, may be accommodated by *legislative* protections encompassed in duly enacted statutes even if the Free Exercise Clause does not, of its own force, protect them. This Court said in *Smith*, "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. The decision below makes this an empty "expectation" by reading a statute designed to protect religious practices as providing virtually no protection.

I

THE DECISION BELOW ERADICATES THE STATUTORY OBLIGATION OF EVERY EMPLOYER TO MAKE *SOME* EFFORT AT "REASONABLE ACCOMMODATION"

In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), this Court construed Section 701(j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j). While the Court majority held that the statute did not require an employer "to choose any particular reasonable accommodation" (479 U.S. at 68), there was no doubt expressed in the Court's opinion that the statute set out an "accommodation obligation." 479 U.S. at 69.

The Eleventh Circuit's decision approves a course of conduct in which *no* effort whatever at accommodation was made by the defendant. That is contrary to the language of the statute and to the many cases cited in the petition for certiorari in which federal courts of appeals have required some effort at accommodation.

In fact, possible accommodation in this case was far easier than might appear at first blush. During the "field training assignment" period for Tampa police officers, trainees were expected to work for four ten-hour days. Nonetheless, the Tampa Police Department did not assign petitioner to a field training group that worked Sunday through Wednesday, with Thursday, Friday and Saturday off. With full knowledge of his religious convictions, the Tampa Police Department assigned petitioner to a Friday-through-Monday shift. This plainly conflicted with his religious obligation to refrain from work between sundown Friday and sundown Saturday. It amounted to a disqualification of any Seventh-Day Adventist or any

Orthodox Jew — or, indeed, any Sunday-observing Christian — from the Tampa Police Department.

This Court should review this case to overcome the crippling effect that this decision and its companion, *Beadle v. Hillsborough Court Sheriff's Office*, 29 F.3d 589 (11th Cir. 1994), pending as No. 94-1610, have on religious observers seeking employment within the States covered by the Eleventh Circuit. Employers in those jurisdictions who have reason to maintain some work-force around-the-clock seven days a week will henceforth believe that they may refuse to hire religious observers, no matter how easily they can be accommodated.

II

THE DECISION BELOW UNDERMINES LEGISLATIVE PROTECTION FOR RELIGIOUS MINORITIES IN DEROGATION OF *EMPLOYMENT DIVISION v. SMITH*

If not for *Employment Division v. Smith*, 494 U.S. 872 (1990), petitioner could have brought a constitutional claim under the First and Fourteenth Amendments against governmental employers who were refusing to hire him or were forcing him to resign because his religious convictions would not be accommodated in his governmental employment. It would then have been the defendants' burden to establish that there was a compelling governmental interest that justified denying employment on the Tampa

Police Department to the petitioner — even in jobs that did not require Saturday work. *

In deciding *Employment Division v. Smith, supra*, this Court held that the Free Exercise Clause gave petitioner no right to demand accommodation or, in the absence of any accommodation, a showing of a "compelling governmental interest." Instead, the Court majority has remitted religious observers like petitioner to legislative accommodation.

Section 701(j) is precisely such a form of legislative accommodation. If it is to have any meaning in the context of local government employment, it cannot be limited, as the Eleventh Circuit has limited it, to government employers that do not have large employment rolls, are not involved in the "protection of lives and property," and do not maintain a work force around-the-clock. If these are to be exemptions from the statutory requirement of "reasonable accommodation" and "undue hardship," the Congress should write them into the statute.

In view of the participation of the Equal Employment Opportunity Commission as *amicus curiae* in support of petitioner in the Eleventh Circuit, this Court should, at the very least, request the Solicitor General to state the views of the United States with regard to this petition.

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* It was undisputed that weekend work was not required of the officers who were in the "downtown squad." See Pet. App. 4a. Another possible accommodation was to hire petitioner as a background investigator. Pet. 7.

CONCLUSION

For the foregoing reasons, the Court should grant writs of certiorari in both No. 94-1610 and in 94-1705 and consolidate the cases for argument.

Respectfully submitted,

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(5)

No. 94-1705

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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MOTION OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE NATIONAL ASSOCIATION OF EVANGELICALS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND THE NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NO. 94-1705

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, et al,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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Motion Of The General Conference of Seventh-day Adventists and The National Association of Evangelicals For Leave To File An *Amicus Curiae* Brief In Support Of Aston A. Beadle's Petition For A Writ Of Certiorari

---

The Seventh-day Adventist Church and the National Association of Evangelicals respectfully move this Court for

leave to file the accompanying *Amicus Curiae* Brief. Counsel of Record for the Petitioner has consented to filing of this Brief; however, Counsel for Respondent declined to do so.

INTEREST OF *AMICI CURIAE*

The General Conference of Seventh-day Adventists, established in 1863, is a recognized religious organization with a worldwide membership of 8 million. Within the fifty states and the District of Columbia are more than 3,000 local Seventh-day Adventist congregations with approximately 775,000 members.

Seventh-day Adventists follow the Bible command that the Sabbath the seventh day, be set aside from secular work and worldly endeavors. Sabbath observance is by no means arbitrary, mechanical or ritualistic. Rather it represents a weekly memorial to the creative power of God and an invitation to the believer for a personal fellowship with God (Exodus 20:8-11). The observance of the Sabbath is a symbol also of man's creation in the image of God with the dignity of free choice and freedom from servitude (Deuteronomy 5:12-15).

Because of their Sabbatarian beliefs and practices, Seventh-day Adventists often encounter difficulties in the work place. In one four year period, the Department of Public Affairs and Religious Liberty of the General Conference of Seventh-day Adventists recorded more than 800 employment problems involving Sabbath observance in the United States. Following this Court's decision in Trans World Airlines, Inc. V. Hardison, 432 U.S. 63 (1977), which construed the religious accommodation provision of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(j), the number of

problems has ballooned.

***

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constitutency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

***

Because of long standing interest in protecting the religious freedom of those who for sincere religious reasons cannot work on a Sabbath or holy day, *Amici* request the Court grant this motion for leave to file an *Amicus Curiae* Brief supporting Aston A. Beadle's Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NO. 94-1705

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, et al,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

Amicus Curiae Brief of the General Conference of Seventh-day Adventists and the National Association of Evangelicals in Support of Petitioner

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

For the reasons herein stated, the General Conference of Seventh-day Adventists and the National Association of Evangelicals, *as amici curiae*, request the Court to grant Aston

A. Beadle's Petition for a Writ of Certiorari.

INTEREST OF THE *AMICI CURIAE*

A statement of *Amici Curiae's* interest appears in the attached Motion for Leave to File this Brief.

Evolving case law which addresses religious accommodation, will affect future employment opportunities for all Sabbatarians, and other persons who give special significance to a particular period of time for religious purposes. *Amici Curiae* express concern for such disadvantagaed persons as well.

Amici secured Petitioner's written consent to the filing of this Brief. (See Appendix A) The letter of consent has been filed with the Office of the Clerk of this Court. Respondent declined to give its consent.

SUMMARY OF ARGUMENT

Eighteen years ago this Court's decision in Trans World Airlines v. Hardison, 432 U.S. 63 (1977) dealt a "fatal blow" (*id.* at 86) to Congressional efforts to accommodate an employee's religious practices. Ironically, this blow was delivered, not by the Court itself, but by employers and subsequent court decisions which distorted Hardison's counsel. While the work place remains open irrespective of one's race, sex, national origin, disability or age, no such protection now exists for religious practices, despite the high place our society and the U.S. Constitution afford the free exercise of religion.

Because Beadle typifies the distortion of Hardison, it

provides the Supreme Court a unique opportunity too further clarify and resuscitate the religious accommodation provisions of Title VII of the Civil Rights Act of 1964. Failure to correct this distortion leaves workers without a remedy when faced with the cruel choice between religious practice and employment. To correct such an unintended consequence of Hardison the Petition for a Writ of Certiorari should be granted.

ARGUMENT

The Supreme Court's decision in Trans World Airlines v. Hardison, 432 U.S. 63 (1977), has proven to be a watershed for religious accommodation in the work place. Employers and many Courts today use Hardison to effectively minimize Title VII's protection against religious discrimination.

The consequences of Hardison are best seen by an overview of Title VII's religious accommodation requirement. First, Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . " Second, Section 701(j) of the Act, added by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e(j), defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the

conduct of the employer's business."

The reasonable accommodation provision serves that "valid secular legislative purpose" Committee for Public Education v. Nyquist, 413 U.S. 756 at 773 (1973) and Thornton v. Caldor, 472 U.S. 703 at 712 (1985) (O'Connor, J., concurring), as that served by Title VII generally - seeking "to achieve equality of employment opportunities" by "remov[ing] . . . artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" Griggs v. Duke Power Co., 401 U.S. 424 at 429, 430 (1971). Congress properly determined that an individual's employment opportunities should depend solely on job qualifications and that one's religion -- as well as one's race, nationality, and sex -- should not affect such opportunities.

The reasonable accommodation provision (Section 701(j) of the Act) represented a permissible legislative effort - plainly secular in purpose - to identify the circumstances where an individual's religious practices are sufficiently relevant to his job qualifications that they properly be taken into account in connection with an employment decision. No exceptions - "public policy" or otherwise - were written into the law.

Section 701(j) was added in 1972 by a Senate floor amendment to the Equal Employment Opportunity Act. Senator Jennings Randolph, who proposed the amendment, described its intent as furthering Title VII's guarantee of "freedom from religious discrimination in the employment of workers" and "to resolve by legislation - and in a way I think was originally intended by the [1964] Civil Rights Act - an issue which the Courts apparently have not resolved" (118

Cong. Rec. 705, 706). That issue was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices conflicted with the employer's work schedules. See Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1978).

While Senator Randolph's remarks included an expression of special concern about the dwindling membership of certain Sabbatarian sects (118 Con. Rec. 705), the overriding need for the amendment was to eliminate "religious discrimination in . . . employment (*id.*). He agreed with Senator Dominick that the provision would protect the equal employment opportunities not only of Sabbatarians, but also members of any "other religious sect which has a different method of conducting their lives than do most Americans" (*id.* at 706). The law's valid secular purpose was not to advance religion but rather, in "the spirit of religious freedom" (*id.*), to ensure that no individual's religious practices would needlessly restrict his work opportunities. This objective was fully in accord with the general purposes of Title VII as a whole.

The reasonable accommodation provision sought to restrain employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. The amendment provided job security except when accommodation of an employee's religious practices would impose an undue hardship on the employer's business.

In Hardison this Court addressed the extent of an employer's Title VII obligation to accommodate an employee's religious beliefs which prohibited him working on Saturday. The Court's analysis was informed by several factors: the

maintenance and overhaul base was an essential part of the defendant's operation; the department was open 24 hours a day, 365 days per year; an absent employee had to be replaced by a worker from another department; the employees at the facility were subject to a collective bargaining agreement which gave most senior employees first choice for job and shift assignments; Hardison's job was essential and on weekends he was the only person available; a vacancy in the department would have impaired its function which was critical to the airlines operations; to have filled his job from another area would have undermanned another operation; and to employ a replacement worker would have required the employer to pay premium wages.

The Court found the intent of Section 701(j) was to make unlawful an employer's failure to make a reasonable accommodation of its employees' religious practices, short of undue hardship. Yet Congress provided no guidance for determining what was a reasonable accommodation; or what constituted "undue hardship." In Hardison, the Supreme Court provided guidance as to the meaning of these terms.

In finding for the employer, the Court adopted the finding of the District Court "that TWA had done all that it could do to accommodate Hardison's religious beliefs without either incurring substantial costs or violating the seniority rights of other employees." 432 U.S. at 83, n.14. The Court was unwilling to carve out a special exception to the seniority rights of the collective bargaining agreement which the employee had argued was an available reasonable accommodation. Thus the proposed accommodation requiring an exception to the collective bargaining agreement was determined to be unreasonable.

Further, the costs of hiring qualified personnel to replace Hardison each week - which required the payment of premium wages and resulted in lost efficiency in other jobs - were determined to be an undue hardship on the employer. "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. 84. While finding for the employer, the Court in Hardison recognized the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment.

The Eleventh Circuit decision rests on Hardison. Yet the facts in this appeal are quite different: Beadle was in a training program, there was no "24 hours a day, 365 days a year" requirement; there was no concern about replacement employees being transferred from one department to another with a lowering of productivity; there was no collective bargaining agreement with a seniority provision limiting accommodation alternatives; there was no showing that his position as a trainee was essential to the operation of the Tampa City Police Department; there was no showing of an impairment in the department's operation; nor was there a showing that the city would have to pay premium wages, or incur any additional financial cost, to accommodate Beadle. Mere inconvenience and a wooden adherence to policy provided the employer's only justification. Finally, neither Title VII nor Hardison created a "public safety" exception to the religious accommodation provisions.

Unlike Hardison Tampa City had not exhausted all available means of accommodation. Beadle was "randomly" assigned a work schedule which resulted in a conflict with his religiously required Sabbath observance, despite the existence of a work schedule which would have accommodated his religious practices. The City admitted such an assignment

would *not* have been detrimental to his training. Tampa City did not allow recruits to use vacation or leave time during this training period; yet there was no showing why a limited exception to this rule could not be created for Beadle's benefit. Beadle's training could have been extended a short period of time at no cost to the City to give him any additional required experience. Such an extension had been used by other recruits who appeared to need further training.

The religious accommodation provision of Title VII has become a dead letter. The federal courts, as illustrated in the Eleventh Circuit's opinion, have used Hardison to effectively exclude from the workplace persons who need a religious accommodation. This has been accomplished in two ways. First, under the decisions the employer need not attempt an actual accommodation. Instead a mere allegation of the likely results often suffices. Second, an "undue hardship" no longer involves financial costs. Inconvenience to either the employer or other employees is enough to defeat claims of religious discrimination under Title VII.

Certainly the Court never intended such consequences. The reported cases involving interpretation of Section 701(j) number upwards of 200. Yet *Amici* believes these are but the tip of the iceberg. Harsh reality finds employers and courts alike continuing to discriminate against religious minorities. This flagrant disregard of remedial legislation passed to accommodate our First Liberty is carried out in the name of Hardison. Ironically the physically disabled in this country are treated more favorably when the "undue hardship" test is applied to their circumstances.

Amici asks the Court to use Beadle as a vehicle to revisit Hardison. Viability of the religious accommodation

accommodations," "undue hardship," and "diminimis cost" are to be interpreted. Hardison-based misunderstandings must be clarified and important questions answered: Does a claim of inability to accommodate satisfy the requirements of the law; or must the employer show an actual attempt at accommodation; is there a "public safety" exemption in the law; and does undue hardship entail di minimis costs of a financial nature; or does it simply mean mere inconvenience or some other unpleasantness? Clarification on these issues is critical if congressional intent in passing Section 701(j) is to become a reality.

CONCLUSION

The Petition for A Writ of Certiorari should be granted allowing the Court an opportunity to address the misapplication of its decision in Trans World Airlines v. Hardison; and thus afford those seeking a work place religious accommodation the protection intended by Congress.

Respectfully submitted,

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DATED: 19 May 1995

APPENDIX A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NO 94-1705

ASTON A. BEADLE,

PETITIONER,

v.

CITY OF TAMPA, FLORIDA, ET AL

RESPONDENTS.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

---

Petitioner's Consent to the Filing of an *Amicus Curiae* Brief

Now Comes Lee Boothby, Esquire, Counsel for the

Petitioner Aston A. Beadle, and pursuant to Rule 37 of the Rules of the Supreme Court of the United States, hereby Consents to the filing of an *Amicus Curiae* Brief by the General Conference of Seventh-day Adventists and the National Association of Evangelicals in support of Aston A. Beadle's Petition for A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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Dated: May 12, 1995

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NO. 94-1705

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, a Florida municipal corporation, and THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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CERTIFICATE OF SERVICE

I, Walter E. Carson, a member of the Bar of this Court, hereby certify that on this 19th day of May, 1995, three copies of the Motion of the General Conference of Seventh-day Adventists and the National Association of Evangelicals for

Leave to File An *Amicus Curiae* Brief and and *Amicus Curiae* Brief of the General Conference of Seventh-day Adventists and the National Association of Evangelicals, In Support of Petition For A Writ Of Certiorari, in the above-entitled case, were mailed First Class Mail, postage prepaid, by Byron S. Adams printers of 1220 L Street, N.W., Washington, D.C., acting as my agent, to:

Mark A. Hanley, Esquire
Thomas M. Gonzalez, Esquire
Thompson, Sizemore & Gonzalez
P.O. Box 639
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and

Lee Boothby, Esquire
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I further certify that all parties required to be served have been served.

S/WALTER E. CARSON
WALTER E. CARSON
Counsel for *Amici Curiae*

No. 94-1705

MOTION FILED
MAY 19 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASTON A. BEADLE,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF ADVOCATES INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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NO. 94-1705

IN THE
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Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The
Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Advocates International respectfully moves the Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of counsel for the Petitioner Aston A. Beadle has been obtained; but counsel for Respondents have stated that they neither agree nor object to the filing of a brief by Advocates International.

The movant, Advocates International, is a global network of advocates working in over 150 nations to establish and preserve religious liberty in the United States and abroad. In former Communist countries, Advocates International has worked to establish religious liberty as a part of the rule of law. In the United States, Advocates International has focused on preserving the rights of all minority faiths, and assuring that religious liberties are accorded no less deference than other protected rights. These concerns are squarely implicated in this case.

Dated: May 19, 1995

Respectfully submitted,

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BRIEF OF ADVOCATES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Advocates International is a global network of advocates working in over 150 nations to establish and preserve religious liberty in the United States and abroad. In former Communist countries, Advocates International has worked to establish religious liberty as part of the rule of law. In the United States, Advocates International has focused on preserving the rights of all minority faiths, and assuring that religious liberties are accorded no less deference than other protected rights. These concerns are squarely implicated in this case.

SUMMARY OF THE ARGUMENT

Title VII requires, as do other civil rights laws such as the Americans with Disabilities Act, that employers "reasonably accommodate" their employees, unless that accommodation poses an "undue hardship" on the employers. In other civil rights contexts, the right of protected persons to seek "reasonable accommodation" has been generously interpreted by the courts. The same language in Title VII's religious protections has been narrowed to the brink of extinction. In this case, the Eleventh Circuit obliterated any remnant of a religious adherent's right to seek a "reasonable accommodation" of his religious practice. In so doing, the Eleventh Circuit wrongly extended the "de minimis" standard of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and, by requiring virtually no attempt at accommodation, placed itself in irreconcilable conflict with other circuits which require a good faith effort to make accommodations which involve little or no economic cost. The result in this case is contrary to the language and purpose of Title VII, and is neither mandated nor justified by the Establishment Clause of the United States Constitution. Yet, the lack of judicial guidance on this issue has led the Eleventh

Circuit to conclude that, while other protected groups receive substantial protection, courts may be indifferent to the interests of religious adherents. It is critical that the Court revisit this issue and lay down guidelines to restore substance to the religious protections of Title VII.

ARGUMENT

I. THE RIGHTS OF RELIGIOUS PEOPLE ARE BEING DISFAVORED, AS COMPARED TO THE RIGHTS OF ALL OTHER PROTECTED GROUPS

Two important antidiscrimination laws -- Title VII[1] and the Americans with Disabilities Act[2] ("ADA") -- contain identical statutory standards requiring "reasonable

---

[1] Title VII of the Civil Rights Act of 1964, as amended, forbids employers to discriminate among employees (or potential employees) "because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). In 1972 Congress amended Title VII to include the following definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

[2] The Americans with Disabilities Act forbids "discriminat[ion]" against protected individuals. 42 U.S.C. § 12112(a). "Discriminat[ion]" is defined as "not making reasonable accommodations" to the disabled persons "unless such covered entity can demonstrate that the accommodation would impose an undue hardship of the operation of the business." 42 U.S.C. § 12112(b)(5)(A).

accommodation" unless such accommodation causes "undue hardship" to an employer. Yet, these statutes are spawning judicial interpretations so wildly disparate as to offend common sense. As a result of this disparity, the rights of religious people are accorded less legal protection than the rights of people in other classes which the federal government has undertaken to protect. In their anxiety to remain neutral on religion, some courts have begun the process of stripping the religion protections of Title VII of any substance. Thus, instead of remaining neutral, the courts are transforming religious rights into disfavored rights.

The opinion of the Eleventh Circuit in this case is an extreme example of this distressing trend. If the Eleventh Circuit's opinion is allowed to stand, Congress' mandate that an employer must "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless the employer can show that such accommodation would cause "undue hardship," 42 U.S.C. § 2000e(j), has been rendered meaningless. The Tampa Police Department admittedly made no effort, beyond allowing one Saturday off, to reasonably accommodate the religious practice of Mr. Beadle, although the Department could have made assignment changes which would have had no economic impact. There was no real showing that these easily accomplished assignment changes would have negatively impacted other employees or the functioning of the Department. Yet, the Eleventh Circuit said the Department had no obligation to do more. In the process, the Eleventh Circuit unreasonably extended the definition of "undue burden" which formerly excused employers from efforts which require the employer to bear "more than de minimis [economic] cost" to hold that an employer need not accommodate a religious employee if the accommodation involves "more than de minimis" effort of any kind whatsoever. This unjustified application of the "de

minimis" test to purely non-economic accommodations leaves the religious employee with no meaningful right to seek accommodation at all.

By contrast, the enormous numbers[3] of persons who fall within the ADA's extremely broad scope may employ identical statutory language to obtain "reasonable accommodations" which may impose substantial expense on their employers,[4] require job restructuring,[5] and require special privileges for protected persons and/or impositions on fellow employees.[6] The modestly modified work schedule sought by Mr. Beadle, which the Eleventh Circuit held was an "undue burden" under Title VII, would be a commonplace remedy if Mr. Beadle were claiming rights as a disabled person. Such a cost-free schedule modification would not come close to meeting the "undue hardship" standard under the ADA. In fact, such a remedy is specifically prescribed. 42 U.S.C. § 12111(9)(B).

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[3] Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(a)(1).

[4] For example, an employer may be required to make modifications to its facilities to accommodate a disabled person. 42 U.S.C. § 12111(9)(A). If the employer is deemed capable of absorbing the cost, he must do so. Employers are required to bear more than de minimis expense. 29 C.F.R. Part 1630, Appendix § 1630.15(d).

[5] 42 U.S.C. § 12111(9)(B).

[6] *See, e.g., Kent v. Derwinski*, 790 F. Supp. 1032 (E.D. Wash. 1991) (employer required to provide relaxed disciplinary approach to employee and sensitivity training to coworkers as reasonable accommodation to mentally retarded employee).

This nation has no less an interest in assuring that religious people may participate fully in American life than it has in guaranteeing identical rights for the disabled or for any other protected group. The Eleventh Circuit's cavalier treatment of "reasonable accommodation" in the religious context undercuts Congress' effort to provide such assurance and should be corrected by this Court.

II. THE DECISION BELOW CREATES AN IRRECONCILABLE CONFLICT BETWEEN THE ELEVENTH CIRCUIT, WHICH PERMITS EMPLOYERS TO MAKE VIRTUALLY NO ACCOMMODATION, AND CIRCUITS WHICH REQUIRE A SHOWING OF GOOD FAITH EFFORT TO MAKE ACCOMMODATION

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), is the leading case interpreting "undue hardship" under Title VII. *Hardison* addresses an employer's obligation under Title VII to accommodate an employee whose religious convictions barred him from working on Saturdays. *See id.* at 66. Work shifts at TWA were governed, in part, by a seniority system included in a collective bargaining agreement. *See id.* at 67. When Hardison voluntarily transferred to a new building he lost the seniority by which he had previously avoided work on his sabbath. *See id.* at 68. Allowing Hardison to have every Saturday off would have left TWA with the dilemma of having an essential position empty, since Hardison was the only employee who could fill the position, or employing someone not regularly assigned to work Saturdays at premium wages. *Id.* at 67. When Hardison refused to report to work on Saturday, he was discharged. *Id.* at 69. This Court held that TWA would have suffered an

undue hardship within the meaning of Title VII if it were compelled "to carve out a special exception to its seniority system" (*id.* at 83) or "to bear more than a de minimis cost" (*id.* at 84) "either in the form of lost efficiency in other jobs or higher wages." *Id.*

In this case, the Eleventh Circuit misapplied *Hardison's* "de minimis" standard to include, not only considerations of cost and efficiency, but virtually any effort -- even cost-free efforts -- which an employer might be asked to make to accommodate an employee. *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995). Thus, where the Tampa Police Department could have made a slight alteration in Beadle's schedule, without significant cost or efficiency implications, the Department was not required even to do that, because even this simple effort was considered a "more than de minimis" burden on the employer's business. *Id.*

This holding creates a conflict with other circuits which have attempted to give meaning to Title VII's religious protections by requiring some good faith effort at accommodation, if such can be made without adverse economic impact. For example, the Eighth Circuit applied *Hardison's* "de minimis" standard in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979).[7] There the court

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[7] *Brown's* reading of Title VII's "undue hardship" requirement has been adopted by other circuits. *See, e.g., Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1089 (6th Cir. 1987) (holding that a mining company failed to meet its duty to accommodate an employer's religious practices when it refused to solicit other employees to swap shifts after the affected employee told the company that his religious convictions prevented him from requesting the shift change himself), *cert. denied*, 485 U.S. 989 (1988); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, (3d Cir.) (holding that because Volkswagen suffered no undue hardship because it would have paid no higher wages as a result of accommodating the

addressed whether General Motors (GM) violated Title VII when it terminated Brown for refusing to work on Saturdays. The Eighth Circuit concluded that, under *Hardison,* "[s]ection 703(a)(1) . . . requires an employer to accommodate the religious observances of its employees unless such accommodation would contravene the provisions of a valid collective bargaining agreement or would cause the employer undue hardship." *Id.* at 958. The Eighth Circuit interpreted "undue hardship" in terms of "de minimis cost" and measured that cost in terms of "overtime," "wages," or "lost efficiency" (*Brown*, 601 F.2d at 959); it found that GM had not incurred any of these as a result of trying to accommodate Brown. *Id.* From this the Eighth Circuit concluded that GM had failed to meet its obligations under Title VII. *See id.* at 962.

Brown and *Beadle* cannot be reconciled. In *Brown* the Eighth Circuit narrowly interpreted *Hardison's* "de minimis cost" test to include only financial considerations. *See id.* at 958-60. In *Beadle* the Eleventh Circuit applied the "de minimis" limitation to any "burden in conducting [the employer's] business." *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995). *Brown* expressly refused as proof of "undue hardship" GM's speculative costs arising from "the alleged cumulative effect that will arise when large numbers

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employee's request not to work Saturdays), *cert. denied*, 479 U.S. 972 (1986); *Burns v. Southern Pac. Transport. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (holding that a union proved no undue hardship merely because it would lose $19 a month in dues and speculated that other union members might invoke religious scruples to avoid union membership and dues), *cert. denied*, 439 U.S. 1072 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 903-04 (7th Cir. 1978) (holding that GAF violated Title VII when it "made no effort to accommodate" an employee's request not to work Saturdays so that he could lead a Bible study course and that GAF could point neither to lost efficiency nor to increased wages if it had tried to accommodate its employee).

of employees want Friday nights off . . . ." *Brown*, 601 F.2d at 960. *Beadle* rested its holding on the vague, speculative conclusion that "requiring the Department to grant shift exceptions to Beadle would result in greater than de minimis cost in light of the public health, safety and welfare considerations associated with police work." *Beadle*, 42 F.3d at 636.

While this Court need not resolve every circuit split, *see* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417, 1434-35 (1987), the conflict between *Beadle* and those circuits following the *Brown* approach merits review for at least two important reasons. First, neither statute nor legislative history provides guidance on the scope of an employer's duty to accommodate religious practices and an employee's right to demand such accommodation under Title VII. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). Second, and most important, the intercircuit conflict has arisen because this Court has not squarely addressed the significant constitutional question raised in *Hardison*: To what extent does the Establishment Clause of the Constitution relieve employers of the obligation to accommodate religious rights to the same degree that other important rights must be accommodated?

III. THE GRUDGING SCOPE GIVEN THE "UNDUE HARDSHIP" STANDARD BY THE ELEVENTH CIRCUIT IS NOT CONSTITUTIONALLY REQUIRED

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) (citing *Wisconsin v. Yoder*, 406 U.S. 205

(1972). "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 673 (1970). However, in *Hardison*, this Court limited the scope of Title VII's religious protections in order to avoid deciding whether and when the Establishment Clause singles out the rights of religious adherents and truncates them, rather than protecting them co-equally with the rights of other protected groups. As one commentator has stated, "[T]he Court construed the Title VII requirements narrowly -- far more narrowly than the language and legislative history would suggest. This may have been to avoid deciding the constitutional question . . . ." Michael W. McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1, 57; *accord* United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 104 n.1 (1983).

Though the majority avoided the question, Justices Marshall and Brennan, in dissent, argued that "not all accommodations are costly, and the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. . . . [T]he mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' against which the Establishment Clause is principally aimed." *Hardison*, 432 U.S. at 90, 91 n.4 (Marshall, J., dissenting) (citations omitted). By requiring employers to accommodate the religious practices of their employees so long as accommodation imposes no "undue hardship" on them, Title VII promotes free exercise values within the confines of the Establishment Clause.

Clearly, the accommodation requested by Mr. Beadle was of the type anticipated by Justice Marshall: It is not costly. Yet, the lack of Constitutional guidance in this area has permitted the Eleventh Circuit to infer from *Hardison* that even this minimal accommodation is not required by Title VII. Surely, this result requires that the Court revisit this issue and restore some substance to the religious protections of Title VII.

A prominent commentator on religion and the law has summarized the Establishment Clause argument as follows:

> In part, the issue of accommodations in the private sphere hinges on conceptual changes in legal doctrine arising from the twentieth-century expansion of the welfare-regulatory state. In an earlier era, when most personal interests were left to the tender mercies of the private market, the accommodation of religion in the private sphere would have been a form of promotion or favoring of religion. Now, when government intervenes in the private sphere to protect a wide variety of personal interests, the idea that religious interests (alone) should be treated with indifference cannot be maintained. When government protects religious freedom in the private sphere in ways comparable to its protection of secular interests, it should be held to be constitutional.

Michael W. McConnell, *Accommodation of Religion: An Update and A Response to Critics*, 60 Geo Wash. L. Rev. 685, 712 (1992).

CONCLUSION

At a time when the rights of other protected groups have expanded, the Eleventh Circuit has, as a practical matter, obliterated any right of a religious adherent to seek accommodation of his religious practice from his employer. Yet, "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Respectfully, it is the obligation of this Court to review and reverse this decision, and to set out guidelines which will restore meaning to the religious protections of Title VII.

Dated: May 19, 1995

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October Term, 1994

ASTON A. BEADLE

Petitioner,

v.

CITY OF TAMPA, FLORIDA, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Agudath Israel of America respectfully moves for leave to file the accompanying brief amicus curiae in the above-captioned case.

Founded 73 years ago, Agudath Israel of America is a national Orthodox Jewish organization with a deep and

abiding interest in the laws that protect religiously-observant Americans in the workplace, and in the particular application of those laws to the rights of Sabbath-observers. Sabbath observance is a fundamental tenet of the Jewish faith, and Orthodox Jews adhere strictly to the biblical proscriptions that forbid them to work on the Sabbath day. As an advocate for its constituents' rights and interests, Agudath Israel has sought to safeguard and strengthen the scope of federal, state and local laws that protect Sabbath-observers on the job. As a community liaison, Agudath Israel occasionally mediates in workplace disputes and in efforts to reach agreement on job schedules and on other arrangements that -- as required by Title VII of the Civil Rights Act of 1964 -- "reasonably accommodate" the religious requirements of Sabbath observers without causing "undue hardship" to the commercial interests of their employers.

Agudath Israel is of the view that Title VII protections for religious practitioners, as interpreted by the courts, have proven inadequate. Because this case would afford the Court an opportunity to clarify and strengthen an employer's obligations under Title VII, Agudath Israel, and the constituency it represents, have an important stake in the petition for certiorari.

Agudath Israel believes that it would bring to this case a perspective not currently before the Court. Its proposed *amicus curiae* brief advances an argument that extends beyond those offered in petitioner's brief -- *i.e.*, that the phrase "undue hardship" in Title VII should be accorded the same meaning it has under the Americans with Disabilities Act, excusing an employer from reasonable

accommodation only upon a showing of "significant difficulty or expense." Agudath Israel believes there are constitutional dimensions to this argument, as detailed in its proposed *amicus* brief, and that they deserve full consideration by this Court.

Counsel for petitioner has responded affirmatively to Agudath Israel's request for consent to file an amicus brief. Counsel for respondent, however, has withheld such consent, indicating to counsel for Agudath Israel in a telephone conversation on May 17, 1995 that he neither consents nor objects to Agudath Israel's filing of an amicus brief. Hence the need for this motion.

For the reasons stated above, Agudath Israel respectfully urges the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in support of the petitioner.

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish movement. As an advocate for Orthodox Jewish interests, Agudath Israel plays an active role in helping promote and safeguard the rights of observant Jews and other religious minorities.

One of the most important of those rights is the right to seek and hold employment without discrimination on the basis of religious identity or practice -- a right embodied in federal statutory law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and directly implicated in this case. Sadly, as Agudath Israel can attest through its constituents' personal experiences, religious discrimination in the workplace -- especially discrimination against Sabbath observers -- continues to be a serious problem in our society; and it has become increasingly evident, as the decision below illustrates, that Title VII has failed to realize its promise as a legal bulwark against such discrimination.

In Agudath Israel's view, a large part of the reason for that failure is this Court's holding in *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977). Under Title VII, an employer is obliged to make reasonable accommodation to an employee's "religion," defined to include "all aspects of religious observance and practice, as well as belief," unless the employer shows that such accommodation would cause "undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). The statute provides no guidance to help determine whether any given hardship is "undue." Such guidance was provided, instead, by *Hardison*: the Court held that an employer can demonstrate "undue hardship", and thereby avoid Title VII's mandate of reasonable accommodation of religion, simply by showing that such accommodation would involve "more than a *de minimis* cost". 432 U.S. at 84.

Dissenting in *Hardison*, Justice Marshall characterized the decision as "a fatal blow to all efforts under Title VII to accommodate work requirements to

religious practices." 432 U.S. at 86 (Marshall, J., dissenting). His words, unfortunately, have been proven largely prophetic. As one Circuit Court has noted, "a standard less difficult to satisfy than the '*de minimis*' standard for demonstrating undue hardship expressed in *Hardison* is difficult to imagine." *Yott* v. *North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979). In a growing number of cases, lower courts applying *Hardison* -- including this one -- have diluted the protections of Title VII further still, by allowing employers to adduce amorphous non-economic burdens as an "undue hardship" on their business. The net result: a stubbornly persistent pattern of discrimination against Sabbath observers in the workforce.

Agudath Israel believes that, contrary to *Hardison*, hardship ought not be deemed "undue" for purposes of Title VII unless it entails significant difficulty or expense. Indeed, as further developed herein, Agudath Israel believes that *Hardison*'s *de minimis* "more than a *de minimis* cost" standard raises serious constitutional free exercise questions that merit the Court's careful consideration. This case, which so starkly illustrates the weakness of existing Title VII protections for Sabbath observers in the workforce, affords the Court an opportunity to undertake such consideration.

ARGUMENT

"UNDUE HARDSHIP" FOR PURPOSES OF TITLE VII SHOULD HAVE THE SAME MEANING "UNDUE HARDSHIP" HAS FOR PURPOSES OF THE ADA

Petitioner's brief, at 15-16, cites a string of cases demonstrating a judicial trend toward what petitioner correctly describes as the "emasculat[ion]" of Title VII's "reasonably high 'undue hardship' standard" in favor of "a much lower 'more than *de minimis* burden' standard." Agudath Israel concurs with petitioner that this trend of judicial emasculation, while purporting to be based on *Hardison*, in fact misapprehends *Hardison*. "Undue hardship," per *Hardison*, means *identifiable economic costs* that are more than *de minimis* -- "costs," in the words of the applicable EEOC regulations, "similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*." 29 C.F.R. §1605.2(e)(1). "Undue hardship" does not mean -- and certainly *ought* not mean, if Title VII's religious accommodation requirement is to have any force -- amorphous non-economic burdens an employer would have to bear in accommodating an employee's religion. For that reason alone, this case -- an egregious example of the trend toward unwarranted extension of *Hardison* -- is worthy of the Court's review.

More fundamentally, however, the time has come for this Court to reconsider its *Hardison* "more than a *de minimis* cost" understanding of the statutory phrase "undue hardship." Not only has the *Hardison* standard, especially as applied (or misapplied) in the lower courts, proven to be insufficiently protective of religious workers; it is simply no

longer tenable as a matter of statutory construction, and may even raise serious questions of constitutional propriety. That is because it conflicts directly with the standard Congress itself established in defining "undue hardship" in the analogous context of the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (ADA) -- thereby creating the constitutionally problematic dichotomy between the low level of statutory protection accorded religious workers who require employment accommodation and the considerably higher level of statutory protection accorded handicapped workers who require employment accommodation.

The ADA, enacted in 1990, makes it unlawful for employers and other "covered entities" to "discriminate" in employment on the basis of an employee's or prospective employee's disability. 42 U.S.C. §12112(a). In language reminiscent of Title VII, the ADA statute defines the term "discriminate" to include:

> "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, *unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity*". 42 U.S.C. §12112(b)(5)(A) [emphasis added].

Unlike Title VII, however, the ADA statute explicitly defines the term "undue hardship". Under the statute, "undue hardship means an action requiring *significant difficulty or expense*" [emphasis added], when

considered in light of certain statutorily enumerated factors relating to the type of accommodation necessary, the facility at which the accommodation is to be made, and the entity required to make the accommodation. 42 U.S.C. §12111(10).

The statutory "significant difficulty or expense" standard governing "undue hardship" defenses under the ADA, by its very terms, imposes on employers a greater obligation than does the *Hardison* "more than a *de minimis* cost" standard governing "undue hardship" defenses under Title VII. Indeed, the legislative history of the ADA makes clear that in enacting protection for disabled employees, Congress was fully cognizant of the *Hardison* standard, considered it inadequate, and expressly defined "undue hardship" as it did to preclude a *Hardison*-like reading of the ADA. Thus, in its report on the ADA, the House Public Works and Transportation Committee took pains to emphasize that:

> "[T]he principles enunciated by the Supreme Court in *TWA* v. *Hardison*... are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under [T]itle VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimis* cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted

> in the statute -- i.e., *a significantly higher standard than that articulated in* Hardison." 1990 U.S.C.C.A.N. 4, Legislative History, at 350 [emphasis added].

If, as *Hardison* teaches, the protections of Title VII are available to religious practitioners in the workforce only if an employer's cost of reasonable accommodation is *de minimis*; and if, as the plain language and explicit legislative history of the ADA teach, the protections of the ADA are available to handicapped persons in the workforce even when the employer's cost of reasonable accommodation is more than *de minimis*, so long as it does not rise to the level of "significant difficulty or expense"; then a stark question is posed: *Why are religious workers afforded less protection under the law than handicapped workers*?

The question is one of constitutional magnitude. Presumably the constitution would not mandate that private employers make any form of accommodation to employees' special needs. However, having independently decided to create its own legislative accommodation mandate through anti-discrimination statutes like Title VII and the ADA, Congress cannot give handicapped workers greater protection than religious workers without implicating First Amendment free exercise concerns. Even *Employment Division, Oregon Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), the controversial case in which the Court severely constricted the scope of constitutional free exercise, acknowledged that where government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship'

without compelling reason." 494 U.S. at 884.

Continued adherence to *Hardison*'s expansive reading of Title VII's "undue hardship" defense -- and its correspondingly niggardly reading of Title VII's reasonable accommodation requirement -- would thus raise serious constitutional concerns. It would also raise problems of statutory construction.

As a general rule, when two statutes have similar purposes -- as they do here; both Title VII and the ADA are designed to protect employees who require accommodations for their special needs in the workforce -- and employ similar language -- again, as they do here; both Title VII and the ADA mandate "reasonable accommodation" and permit an employer to avoid that mandate by showing "undue hardship" -- the two statutes are treated "*in pari materia*", and ambiguities in one are often resolved by reference to the other. *See generally* 2B Sutherland Statutory Construction §51.03 (5th Ed. 1992). As the Court has indicated in an analogous context:

> "Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. [Citation omitted.] We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than

nonsense out of the *corpus juris*."

West Virginia University Hospitals v. *Casey*, 499 U.S. 83, 100-01 (1991). Here, of course, this would not be the first time Title VII's ambiguous "undue hardship" clause would be presented to the Court, but the operative principle is the same; in light of Congress' clear interpretation of "undue hardship" in the subsequently enacted ADA, it would make nonsense rather than sense out of the *corpus juris* to interpret Title VII differently than the ADA.

To avoid these constitutional and interpretive problems, Agudath Israel submits, the Court should revisit the Title VII accommodation obligation, and bring it into line with that established by the ADA by requiring an employer claiming "undue hardship" to show that reasonably accommodating an employee's religion would entail "significant difficulty or expense".

Furthermore, just as the ADA instructs that "significant difficulty or expense" is to be determined in light of factors specifically relevant to the disability context, as enumerated in 42 U.S.C. §12111(10)(B), so too would "significant difficulty or expense" be determined for purposes of Title VII in light of factors specifically relevant to the context of religious observance. These factors are already spelled out in existing EEOC guidelines, 29 CFR §1605.2(e), and include: "the identifiable cost [of the accommodation] in relation to the size and operating cost of the employer, and the number of individuals who will in fact need particular accommodation"; and the extent to which the accommodation would require "a variance from a bona fide seniority system" that "would deny another

employee his or her job or shift preference guaranteed by that system."

Elevating the level of protection for religiously observant employees under Title VII as suggested herein would not, in Agudath Israel's view, create independent First Amendment establishment clause problems of the type the Court discerned in *Estate of Thornton* v. *Caldor*, 472 U.S. 703 (1985). The infirmity of the Connecticut law at issue there, which directed employers to permit any employee to take off from work on the employee's chosen day of Sabbath, was its "absolute and unqualified" nature. 472 U.S. at 709. For example, noted the Court, "there is no exception when honoring the dictates of Sabbath observers would cause the employer *substantial economic burdens* or when the employer's compliance would require the imposition of *significant burdens* on other employees required to work in place of the Sabbath observers." 472 U.S. at 709-10 [emphasis added; footnote omitted]. Under Title VII, in contrast, the employer's obligation to provide reasonable accommodation of an employee's religion is by no means "absolute and unqualified" -- even if "undue hardship" is interpreted, as it is under the ADA, to require an employer who seeks to be excused from such accommodation to demonstrate "significant difficulty or expense."

CONCLUSION

Justice Marshall, dissenting in *Hardison*, bemoaned what he saw as "[t]he ultimate tragedy" of the Court's decision: "D]espite Congress' best efforts, one of this Nation's pillars of strength -- our hospitality to religious diversity -- has been seriously eroded. All Americans will be a little poorer until today's decision is erased." 432 U.S. at 97 (Marshall, J., dissenting).

For the reasons set forth in petitioner's brief, and for the additional reasons set forth herein, Agudath Israel respectfully urges the Court to grant a writ of certiorari and seize the opportunity, eighteen years after Justice Marshall's lament, to erase *Hardison* once and for all and restore the full promise of Title VII.

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Statutes:

42 U.S.C. § 2000e *et seq.*
(Title VII of the Civil Rights Act of
1964, as amended) 1,3,9

42 U.S.C. § 2000e(j) 1,3

The City's Opposition buttresses Beadle's position that the court of appeals applied the wrong legal standard — one which is at odds with the declared will of Congress.

1. The City doesn't refute that the Eleventh Circuit's decision conflicts with the undue hardship analysis of *Brown v. General Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) (*see* Petition at 11, 14, 17), as well as with decisions of the Third, Sixth, and Seventh Circuits in *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 133 (3d Cir. 1986); *McDaniel v. Essex Int'l*, 696 F.2d 34, 37, 38 (6th Cir. 1982); and *Redmond v. GAF Corp.*, 574 F.2d 897, 903-04 (7th Cir. 1978) (*see* Petition at 14-15, 17-18). The City chooses to ignore these cases.

Instead, the City rejects the theme of *Brown*, *Protos*, and *Redmond* that an employer must either reasonably accommodate an employee's religious needs (42 U.S.C. § 2000e(j)) or demonstrate an "undue hardship." The City would replace this statutory requirement with a "more than *de minimis* burden" benchmark. It erroneously rejects Beadle's argument that burden is not the same as costs, Opp. at 18, claiming "*Hardison* and its progeny have held that undue hardship can be defined in terms of both economic costs to the employer and the burden on the employer such as loss of efficiency,[1] increased risk, decreased employee morale." Opp. at 20.

2. The City states "To suggest as Plaintiff Beadle has that the City would incur undue hardship *only if* it had to pay

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[1]Beadle understands that economic costs include lost work place efficiency, as well as higher wages. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

overtime, but not if the City has one less patrol officer on the street . . . makes no logical sense and has no legal support." Opp. at 20. This completely misconstrues Beadle's position and bears no resemblance to Beadle's argument.[2]

The statutory standard remains "undue hardship," not "more than *de minimis* burden." Under *Hardison*, an accommodation which results in more than *de minimis* economic cost "either in the form of lost efficiency in other jobs or higher wages" is deemed to be an undue hardship, 432 U.S. at 84.[3] Contrary

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[2]Colonel Fox admitted that during field training when a trainee had to be off, the Department's efficiency was unaltered due to the continued presence of regular officers on the squad. R2-67-194:6-195:24. He testified that even when a regular officer was not available there were sufficient street officers to cover an absence. R2-67-186:1-12. The City's expert even testified it was much easier for law enforcement officers to be off than those in jail detention positions. R3-70-24:2-25:8.

[3]*Hardison* explained why more than *de minimis* economic cost would constitute an undue hardship: "By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to *finance* an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs." 432 U.S. at 84 (emphasis supplied). But here the City was not faced with financing an additional Saturday off. Rather, accommodation alternatives required only Beadle's non-random placement on a training squad with Saturdays as the scheduled day off and, at best, a further minimal deviation from departmental practice, involving no economic cost to the City. The court was "unable to conclude that the accommodation of a transfer of Beadle to another training shift

to the City's claim, *Hardison* did not include other non-economic burdens on an employer within the "undue hardship" criterion. Ironically an accommodation existed which would have allowed Beadle to complete his 16 weeks of field training with never "one less patrol officer on the street." Opp. at 20.

The City, like the Eleventh Circuit, extends the "more than *de minimis* cost" analysis beyond economic costs to include all factors that might burden an employer. In so doing, they ignore congressional intent and rewrite the religious accommodation provisions of Title VII.

In support of this mistaken view, the City argues that to have a higher threshold for undue hardship than "*de minimis*" would infringe on the Establishment Clause. Opp. at 26.[4] This argument, while unique, is clearly wrong. The City looks to Justice O'Connor's concurring opinion in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which she concluded the majority's holding in *Caldor* should not be read to invalidate Title VII's religious accommodation provisions.

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would have deprived another police trainee of the benefits of the neutral scheduling system." App. at 27a.

[4]The City questions the constitutionality of section 701(j) of Title VII, 42 U.S.C. § 2000e(j), contending that a literal application of the "undue hardship" proviso would violate the Establishment Clause. Consequently, Rule 29.4(b) requires the Solicitor General be promptly informed. National Jewish Commission on Law and Public Affairs at page 7 of its *amicus curiae* brief suggests that because of EEOC's *amicus* support of petitioner in the Eleventh Circuit, this Court should request the Solicitor General state the views of the United States. Beadle agrees.

Specifically, it fixes upon that portion of the opinion which noted: "Like the Connecticut Sabbath law, Title VII attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." *Id.* at 712 (O'Connor, J., concurring) (emphasis in original).

The argument contends Justice O'Connor's reference to "private" employers "calls into question whether Title VII's religious accommodation requirements entirely reach public employment." Opp. at 28. The City proposes "it is one thing for a private employer to be required to give an accommodation to its employees, but it is entirely another matter for a public employer to grant a public employee a permanent religious holiday *vis-a-vis* his fellow employees." *Id.* Relying upon *Miller v. Drennon*, 56 Fair. Empl. Prac. Cas. (BNA) 274 (D. S.C. 1991), *aff'd*, 966 F.2d 1443 (4th Cir. 1992), for the proposition that "giving a public employee plaintiff the accommodation he requested constitutes a violation of the Establishment Clause," the City declares it is not required to accommodate Beadle, and to do so would violate the Constitution. Opp. at 30.

The City misconstrues Justice O'Connor's reference to private employers in *Caldor*. Of course, Justice O'Connor was not suggesting existence of a greater Establishment Clause concern with public employers. Quite the reverse. As Justice O'Connor noted in *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985):

> The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues

> Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden.

Contrary to the City's contention, a government employer has a greater accommodation burden because of the free exercise implications.[5]

3. Contrary to the City's assertion, Beadle does not claim "unless the employer suffers 'costs' in terms of monetary costs, then no matter what other economic burden the employer may suffer in accommodating the employee," there is no undue hardship. Opp. at 11. Rather, Beadle relies upon the Third, Sixth, Seventh, and Eighth Circuits' interpretation that *Hardison*'s "more than *de minimis* cost" language relates only to tangible economic costs suffered by the employer, such as payment of premium wages or a demonstrable loss of efficiency. The legal standard remains "undue hardship."

The City extends the "more than *de minimis* cost" analysis to such nebulous factors as "decrease in employee morale" (Opp. at 18), citing *EEOC v. Heil-Quaker Corp.*, 55 Fair. Empl. Prac. Cas. (BNA) 1895 (M.D. Tenn. 1990), and *Cook*

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[5]As National Jewish Commission on Law and Public Affairs observes in its *amicus* brief, at 6, but for *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), Beadle could have brought a constitutional claim against the City of Tampa under the First and Fourteenth Amendments.

v. Chrysler Corp., 779 F. Supp. 1016 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2953 (1993), to support its decreased morale contention. Yet other courts have rejected like arguments. *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978), refused application of a "more than *de minimis*" standard for decreased morale claims. *Burns* involved accommodation of an individual holding religious beliefs against union membership. Although the court acknowledged "free rider" problems could cause serious dissention among employees, it concluded:

> [U]ndue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. (589 F.2d at 402.) An employer or union would have to show, as in *Hardison*, actual imposition on co-workers or disruption of the work routine.

Id. at 407. These arguably conflicting cases underscore the confusion arising from *Hardison*.

4. The City argues "unless Beadle completed the field training program as it existed at the time, he would not enjoy the full benefits of the program by having the opportunity of working with different field training officers, on different shifts, and in different locations of the City." Opp. at 11. It is true that had Beadle been transferred to Sergeant Dawson's squad and left with one training officer for the full training period, he would miss the benefit of working with other training officers. But the three alternative accommodations suggested by Beadle, App. 25a-26a, would have provided for

training by a variety of training officers.[6]

Beadle's supervisor, Sergeant Cook, admitted Beadle's training would not have been compromised, nor would the training program have been adversely affected, for Beadle to remain the full 16 week period on Sergeant Dawson's squad, being transferred between two separate training officers. That is precisely how training was done when Cook's deposition was taken. Cook Dep. R2-66-43:22-44:10; 126:18-129:20.[7]

If there were proof — which there is not — that all available accommodations would have left Beadle inadequately trained

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[6]Only by leaving Beadle with a single training officer during the 16 week field training would there have been a diminution of educational experience. But both of Beadle's Eleventh Circuit briefs (opening brief at pages 28 and 30 and reply brief at pages 39-40) explained how a transfer between two separate training officers within Sergeant Dawson's squad would provide the same continuity and consistency as is currently experienced in the Department's training program.

[7]As American Jewish Congress observed in its *amicus* brief at page 6, it is untenable to claim that Beadle could not function effectively as a police officer without undeviated subservience to a training program subsequently discarded. As the court stated in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), "there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . impact." The fact the Department subsequently adopted a training program essentially the same as proposed by Beadle significantly undercuts its undue hardship defense. But the Eleventh Circuit found the point irrelevant.

as a police officer, then the statutory "undue hardship" may well have been met by the City. But it made no such showing, and the lower courts made no such finding.

The trial court stated "[a]t the trial, City command officers testified that assignments to a particular training squad *without rotation* is detrimental to the consistency of the training and results in lack of proper training. According to the City, it is extremely important to the continuity of the training that the police officers *be trained under different field training officers.*" App. at 18a-19a. Yet available accommodations would have allowed for such training. *See* Pet. at 25-26.

As EEOC argued in its *amicus* brief before the Eleventh Circuit, at page 23, quoting *Benton v. Carded Graphics, Inc.*, No. 931679, slip op. 1994 W.L. 249221 (4th Cir. June 9, 1994) (unpublished):

> It was not enough to find that granting "shift exceptions" would result in some sort of generalized "cost" to the public health, safety and welfare. Rather, at a minimum, the magistrate should have considered the City's evidence of hardship, including the particular requirements of the job in question and the impact on the law enforcement agency, and made findings crediting or rejecting that evidence, as it related to the specific accommodations Beadle proposed. "What the law . . . require[s] is a thorough exploration of all the alternatives that would meet the employee's religious needs, and the fact-based determination of whether any of those programs could be implemented without a predictably certain undue hardship."

The evidence proves that placing Beadle on Sergeant

Dawson's squad, rather than assigning him to Sergeant Cook, would not have been detrimental to the continuity and consistency of the training program. The fatal flaw in the court's factual analysis was weighing the facts as to the claimed burden on the Department under a more than *de minimis* rather than an undue hardship standard.

5. The City argues that resolution of the field training would not have solved the accommodation problem because it would continue after training. But the trial court found no accommodation problem after the training period, saying: "It was also established at the trial that a possible permanent accommodation would have been to permit Beadle to work at what was known as the 'downtown squad.' Officers assigned to this squad worked five days a week during the weekdays and the City's commanders had the prerogative of making assignments to this squad." App. 18a. Contrary to the City's statement that this was "one of the more favorable assignments," Opp. at 24, the trial court made no such finding, rather concluding the position had advantages and disadvantages. App. 18a.[8]

6. Finally, the City argues the trial court did not hold law enforcement agencies, as a matter of law, are exempt from Title VII. Opp. at 24. But that is precisely what the court said: "The Court interprets *Trans World Airlines, Inc. v. Hardison* to provide that Title VII does not require a law enforcement agency of the nature of the City of Tampa Police Department to grant its law enforcement officer a permanent weekly religious accommodation to the exclusion of his or her

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[8]The record shows that whether the downtown squad was favored or disfavored varied from officer to officer. Pegram Dep. R2-62-26:8-27:15.

fellow officers." App. 27a.[9]

The EEOC addressed this mistaken conclusion in its Eleventh Circuit brief, at 10:

> While the nature of law enforcement duties is a factor in determining whether accommodation is possible, the City is bound by the same duty to make reasonable accommodation as any other employer and may avoid liability under Title VII for failing to accommodate only by proving, as a matter of fact, that no accommodation could be made without undue hardship.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, this Court should grant the Petition.

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Respectfully submitted,

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[9]Contrary to the City's assertion, the trial court failed to cite record evidence to support its holding, only stating that "the Court concludes that requiring the Department to grant shift exceptions to Beadle would be to incur a greater than **de minimis** cost because of the public health, safety and welfare considerations associated with police work." App. 27a-28a.

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